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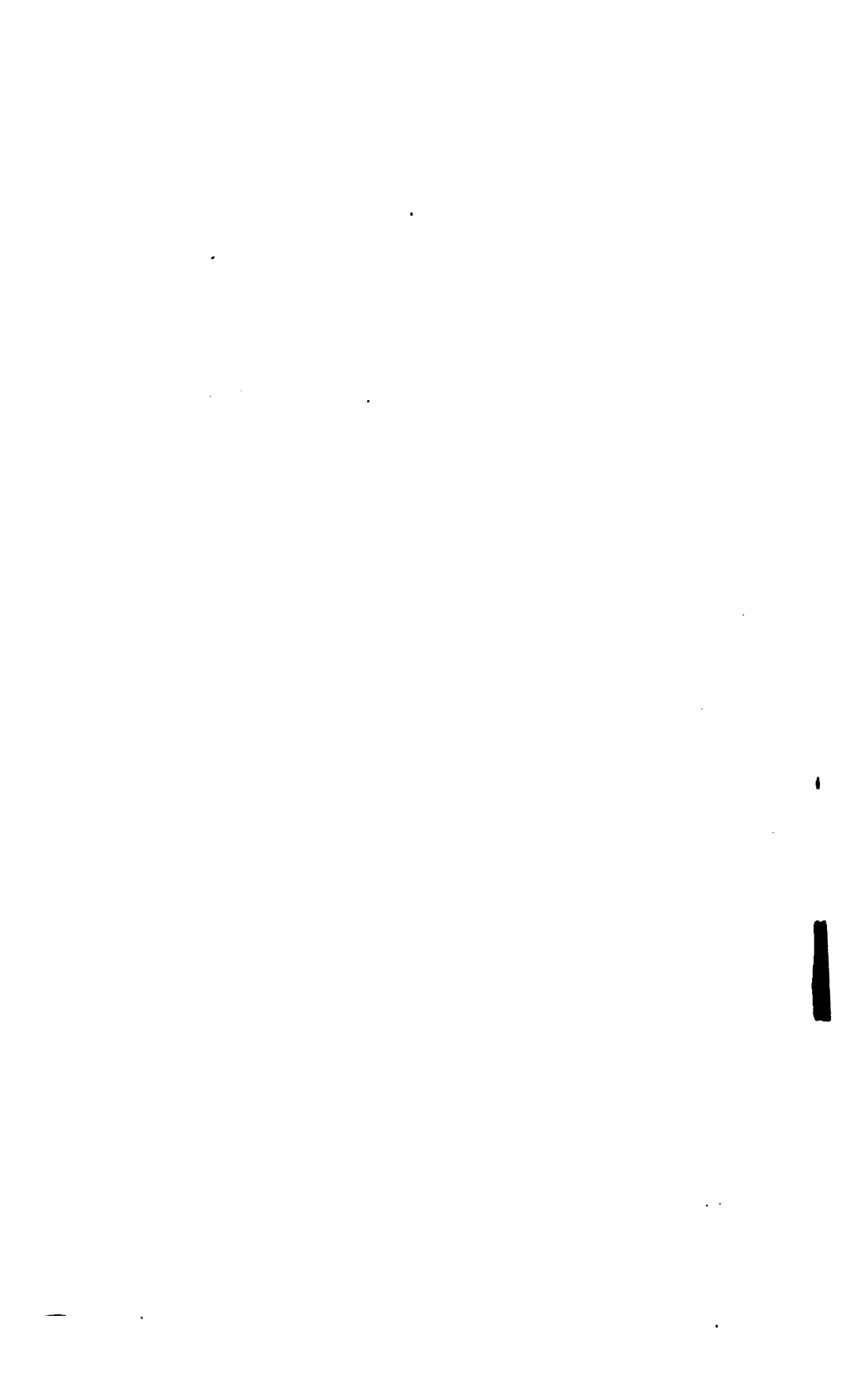
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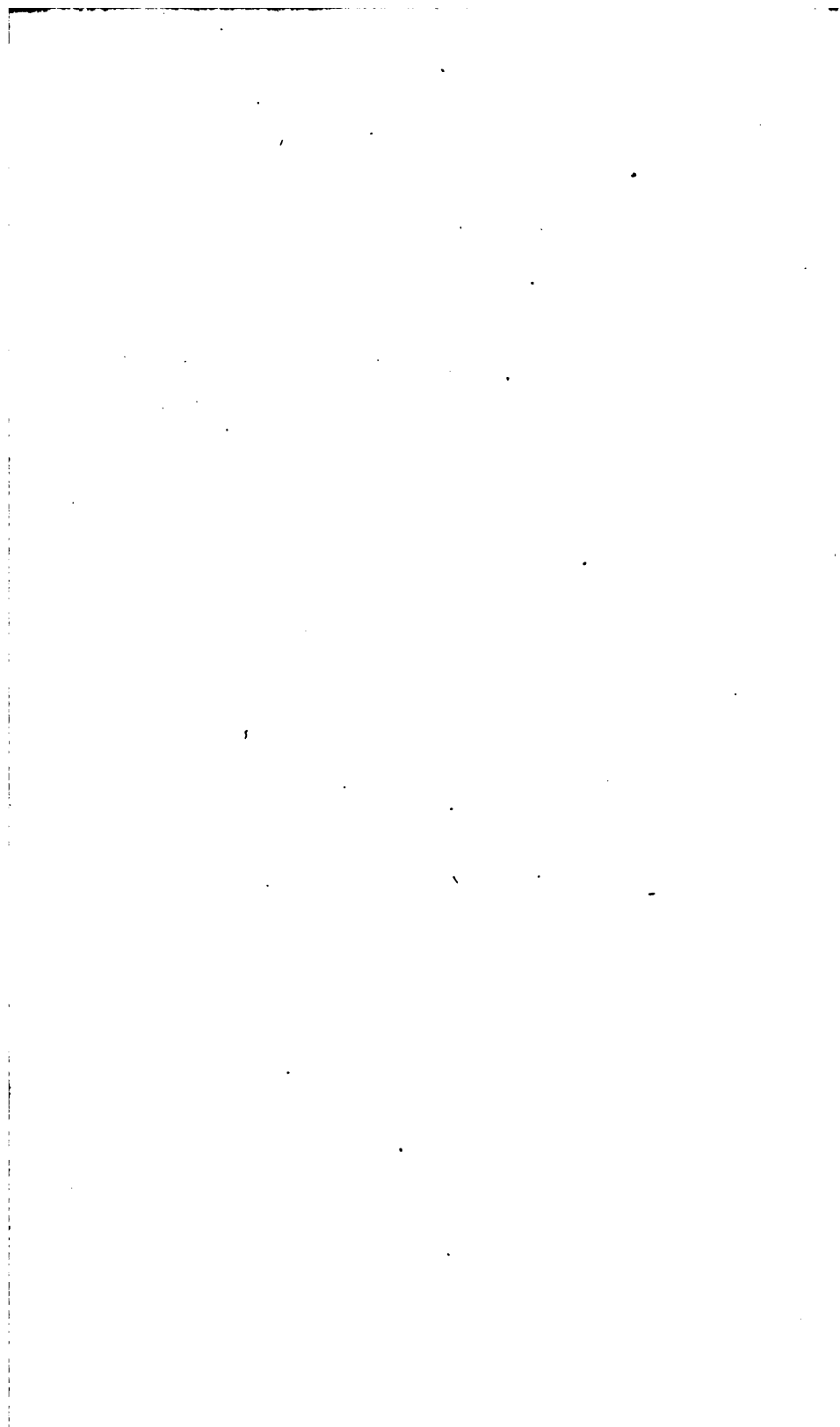




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PROPERTY RIGHTS
OF
MARRIED WOMEN.

THE LAW
AS TO THE
PROPERTY RIGHTS
OF
MARRIED WOMEN,

AS CONTAINED IN THE STATUTES AND DECISIONS, OF
CALIFORNIA, TEXAS, AND NEVADA.

BY
HORACE G. PLATT.

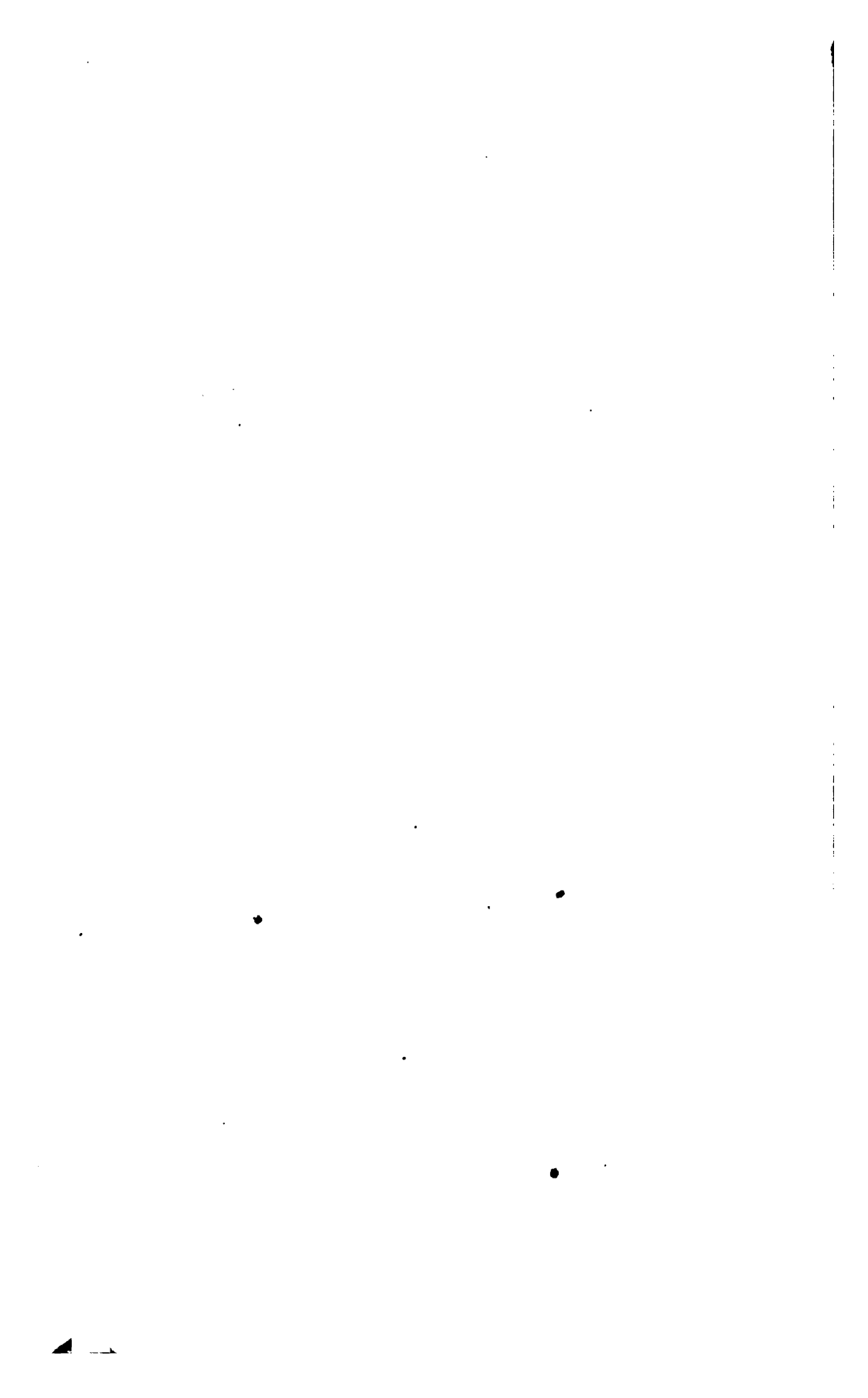
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"Husband and wife are not one under our laws. The existence of a wife is not merged in that of the husband. Most certainly is this true, so far as the rights of property are concerned; they are distinct persons as to their estates. When property is in question, he is not a baron, nor is she covert, if by the former is meant a lord and master, and by the latter a dependent creature, under protection and influence. They are co-equals in life; and at death the survivor, whether husband or wife, remains the head of the family."

Woods v. Wheeler, 7 Tex. 19.



PREFACE.

THE law as to the Property Rights of a Married Woman has been subject to so many changes that its uncertainty has been equalled only by its importance. The growth and diffusion of education among the people have had the unavoidable and necessary result of placing society upon a more enlightened basis. In nothing has this improvement been manifested more strikingly than in the social status of married women, particularly as concerns Property Rights. The necessities of society and the inexorable demands of justice have rendered the doctrines of the Common Law upon this subject almost entirely inapplicable to present social conditions. In most of the States of the Union the Common Law has in this regard been more or less modified by statutory regulations. In three of the States, California, Texas, and Nevada, it has been almost entirely superseded by the Spanish-Mexican law, as modified to suit our American ideas and institutions. Many of the States have constitutional and statutory provisions securing to the wife her separate property and prescribing what this separate property shall include; but only the three States above mentioned have provided for both *separate and community* property. Because of this peculiarity a text-book giving the law of these three States has become a necessity.

HORACE G. PLATT.

SAN FRANCISCO, December, 1884.

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THE PROPERTY RIGHTS OF MARRIED WOMEN.

CHAPTER I.

COMMON LAW.

- § 1. Personal estate.
- § 2. Real estate.
- § 3. Contracts.
- § 4. Separate estate in equity.
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§ 1. A married woman's personal estate.—At common law the husband acquired, by marriage, the absolute ownership and control of all the wife's personal property when once reduced to possession. This extended to her personal property acquired both before and after marriage, and to her earnings. Her jewels, cash, household goods, and all her personalty in possession became his instantly upon marriage. Her notes, checks, bills, all her choses in action, all her property requiring some action to realize its full possession or enjoyment, he must, however, reduce to possession during his life, or they would revert to her. Not even her paraphernalia, her ornaments and wearing apparel, what would now be called

her bridal trousseau, escaped his clutches. Unless, however, he disposed of them during coverture, she recovered them at his death. She had but one chance of saving anything from this general confiscation. When the husband had to resort to the aid of the court in order to get possession of his wife's property, the court could compel him to make a reasonable provision out of it for the maintenance of the wife and her children. This was known as the wife's "equity settlement."¹

The wife's leases for years, or chattels real, the husband might appropriate absolutely, by sale, assignment, mortgage, etc.; but he had to reduce them to possession during his life, or they reverted to her. If he survived her, they vested in him absolutely, like movables.

§ 2. A married woman's real estate.—The husband was entitled to the use during coverture of all the real estate acquired by the wife before and after marriage. The naked ownership remained in the wife and descended to her heirs, subject to the right of the husband to a life-estate therein, if he survived her, and there were living issue born of the marriage. "Where a man takes a wife seized during the coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heir to the wife, has issue by her born alive, and the wife dies, the husband surviving her has an estate in the land for his life, which is called an estate by the curtesy."²

An offset to this tenancy by curtesy was the wife's right of dower. "Dower is where a woman marries a man seized at any time during the coverture of, or enti-

¹ Brown on Domestic Relations, 28; 2 Kent, 139.

² 1 Minor's Institutes, 332.

tled to a right of entry or action in, an estate of inheritance such as that the issue of the marriage may, by possibility, inherit it as heir to the husband, and the husband dies, the wife surviving is entitled to one-third for life, as tenant in dower."¹

The husband alone had power to bind or alienate the wife's real estate during coverture and his tenancy by curtesy, but he could not encumber it beyond his own term.

§ 3. A married woman's contracts.—All contracts of a married woman were utterly void. She was incapable, during coverture, of charging her person by any contract or act whatsoever. An agreement to sell her real estate was void. She was bound by a deed or mortgage only when joined with her husband, but not by any covenants or warranties therein.

The husband was liable for his wife's debts contracted before marriage, but only so long as the coverture lasted. His liability for these debts ceased with his wife's death, his own estate (including all that once had been her's) was not liable therefor after his death, and if she survived him, though shorn of all her personalty and the fruits of her realty, she again became liable for her antenuptial debts.

§ 4. A married woman's separate estate in equity.—In equity the wife's will in the ownership of her property was recognized, if the property had been duly set apart as her separate estate. It was essential that this intent should be manifested by apt words, indicating the intention to invest her with the sole and separate use and enjoyment, or clearly excluding the husband from any

¹ 1 Minor's Institutes, 335.

interest in or dominion over it. The husband's marital rights, however, were not to be divested to a greater extent than the terms of the settlement clearly implied.

Upon her death the separate property was freed from its peculiar incidents, and became like any other property of her's remaining on her decease. The husband's tenancy by courtesy attached, unless expressly prohibited.

She could deal with her separate estate like a single woman, unless expressly prohibited by the instrument of settlement, and hence she might defeat the attaching of the husband's title after death by exercising her power of disposition during her life.¹

§ 5. A married woman's power to make a will.—At common law a married woman could not make a valid will. If she had made her will while she was a *feme sole*, her marriage revoked it. In such a case it could literally be called her last *will*, for the, to her ill-fated, magic of marriage divested her of will to act or not to act. As the cold blasts of winter strip the trees of their fruit and the branches of their foliage, leaving naught but a naked tree, its life dormant, its growth arrested, so did the marriage ceremony, with its cold common law doctrines, take away from woman her goods and chattels, her jewels, her clothing, her earnings, and the rents and profits of her lands, paralyze her power to dispose of her own by will or by deed, and convert her from a being that could reason into a legal imbecile.

Such, in brief, was the common law in regard to the property rights of a married woman. Upon it our law is based, except in so far as it has been changed by statute.

¹ 1 Minor's Institutes, 336; Brown on Domestic Relations, 39; Schouler on Domestic Relations, 189, 194.

CHAPTER II.

SPANISH-MEXICAN LAW.

- § 6. The laws of California and Texas.
- § 7. Community and separate property.
- § 8. A married woman's contracts.

§ 6. The laws of California and Texas in regard to the property rights of husband and wife are substantially like the Spanish laws upon the same subject.¹

The Supreme Court of California said in *Packard v. Arellanes*: "Our whole system by which the rights of property between husband and wife are regulated and determined, is borrowed from the civil and Spanish law, and we must look to these sources for the reasons which induced its adoption, and the rules and principles which govern its operation and effect."²

§ 7. Community and separate property.—Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; whilst property acquired by either by lucrative title solely, constituted the separate property of the party making the acquisition. The fruits, profits and increase of the separate property also belonged to the community.

¹ *Packard v. Arellanes*, 17 Cal. 537; *Burr v. Wilson*, 18 Tex. 370; *Dallam*, 101.

² *Packard v. Arellanes*, 17 Cal. 537.

By *onerous* title was meant that which was created by valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions, or payment of charges to which the property was subject. Lucrative title was created by donation, devise, or descent. All property owned before marriage by either husband or wife was separate property.¹

The law recognized a *partnership* between the husband and wife as to the property acquired during marriage. It mattered not in whose name it was acquired, or with what funds it was purchased, for the reason that the *time* of the acquisition was chiefly to be regarded. The exception to this rule arose when the property was purchased with the proceeds of sale of property belonging to one of the partners, or when there was simply an exchange of one piece or kind of property for another.²

The presumption obtained that all acquisitions during marriage became common property. Exceptions to this rule were required to be proven.³

The control and power of disposition of the common property was in the husband alone; but he could do nothing in fraud of the rights of the wife.⁴

All legitimate debts contracted during the marriage by the husband and wife jointly, or by the husband alone, or by the wife with the husband's consent, were a charge upon the community property.⁵

¹ *Scott v. Ward*, 13 Cal. 471; *Noe v. Card*, 14 Cal. 576; *Fuller v. Ferguson*, 26 Cal. 566; *Wilson v. Castro*, 31 Cal. 420; *Yates v. Houston*, 3 Tex. 452; *Wilkinson v. Wilkinson*, 20 Tex. 242.

² *Parker v. Chance*, 11 Tex. 516; *Scott v. Maynard*, Dallam, 551.

³ *Scott v. Ward*, 13 Cal. 471; *Yates v. Houston*, 3 Tex. 452; *Scott v. Maynard*, Dallam, 548.

⁴ *Wright v. Hays*, 10 Tex. 133.

⁵ *Jones v. Jones*, 15 Tex. 147; *Portis v. Parker*, 22 Tex. 699.

The community of acquests and gains ceased to exist at the moment of the death of one of the partners, with all the legal effects resulting from it. Each party to the community was seized of an undivided half of the common property. Upon the dissolution of the marriage by the death of one of the spouses, the common property vested absolutely, one-half in the survivor, and the other half in the heirs of the deceased spouse. The power of alienation which the law conceded to the husband, continued only during the marriage, after which he could dispose only of that portion which belonged to him. The only charges to which the common property was subjected, after the death of one of the spouses, was the payment of the debts contracted during the matrimony, by either of them, provided they originated in the business of the partnership itself, and not in the private business of one of the partners. The surviving husband retained control and possession of the common property with power to discharge the debts of the partnership. He held the property as a tenant in common with the heirs of his deceased wife.¹

The California Supreme Court, in *Panaud v. Jones*, held that the interest of the children in one-half of the common property did not vest upon the death of the mother; that they had only a defeasible and contingent interest in it, which could not become perfect until the death of their father; and that the *entire* common property was liable not only for the debts of the community, but also for those contracted by the husband

¹ *Panaud v. Jones*, 1 Cal. 514; *Estate of Tompkins*, 12 Cal. 124; *Packard v. Arellanes*, 17 Cal. 537; *Ord v. De La Guerra*, 18 Cal. 74; *Fuller v. Ferguson*, 26 Cal. 547; *Jones v. Jones*, 15 Tex. 149; *Thompson v. Cragg*, 24 Tex. 598.

after the death of the wife. The Texas Supreme Court criticised this rule in *Thompson v. Cragg*, as a misapprehension of the Spanish law, and the California Court subsequently abandoned it.

§ 8. A married woman's contracts.—Husbands and wives could enter into any onerous contract between themselves, but they could not make donations to each other. Such donations, when made, were valid, however, if not revoked before the death of the donor.¹

A married woman was prohibited from entering alone into litigation with other persons without the consent of her husband, but she was not prohibited from instituting and maintaining suits against *him* whenever she had a legal or equitable cause of action against him.²

¹ *Ferris v. Parker*, 13 Tex. 387; *Parker v. Chance*, 11 Tex. 513.

² *Chavez v. McKnight*, 1 New Mexico, 150

CHAPTER III.

A MARRIED WOMAN'S SEPARATE PROPERTY UNDER THE CONSTITUTION AND LAWS OF CALIFORNIA, OF TEXAS, AND NEVADA.

- § 9. Rule of construction.
- § 10. Definition—The Constitution.
- § 11. Definition—The Statutes.
- § 12. Gifts.
- § 13. Laws of what State govern.
- § 14. Increase and profits of separate property.
- § 15. Change in the form or nature of separate property.
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- § 25. Disability of Infancy.
- § 26. Estoppel *in pais*.
- § 27. A married woman's right to sue and be sued.
- § 28. The Statute of Limitations as applicable to a married woman.
- § 29. Effect of marriage upon the rights of a *feme sole* minor as regards the Statute of Limitations.

§ 9. Rule of construction.—*In California* the following rule obtains: "The common law constitutes the basis of our jurisprudence, and rights and liabilities

must be determined in accordance with its principles, except so far as they are modified by statute."¹

In Texas a similar rule is provided by law: "The common law of England, so far as it is not inconsistent with the constitution and laws of this State, shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature."² A similar statute has been in force in Texas since January 20, 1840,³ and yet the Supreme Court, in *Edrington v. Mayfield*, 5 Tex. 366, used the following language :

"The principles and rules of the common law, as to the effect of coverture, so far as they affect the capacity of the wife to hold property in her separate right, are totally expunged from the Texas code of jurisprudence, and, in an investigation of the rights of the wife, must be altogether discarded from consideration. Her capacity to hold property, in her own right, separate and apart from her husband, is as complete and perfect, as that of the husband, to hold in his own right, separate and apart from his wife. There is no difference, in this particular, between their civil rights and capacities."

In *Hall v. Dotson*,⁴ the court said: "To the extent, then, that these statutes and the construction given

¹ *Rowe v. Kohle*, 4 Cal. 285; *Van Maren v. Johnson*, 15 Cal. 312; *Sheldon v. Steamship Uncle Sam*, 18 Cal. 535; *Hittell's Gen'l Laws*, § 599.

Nevada.—Prior to the adoption of the constitution and the passage by the legislature of any statute providing for the separate or common property of husband and wife, their property rights were governed by the rule of the common law, and this common law, so far as it is applicable to the condition of the State, is, in the absence of statutory regulation, presumed to be the law of the State. *Darrenberger v. Haupt*, 10 Nev. 45; *Clark v. Clark*, 17 Nev. 128.

² *Rev. Stats.*, Art. 3128.

³ *Pasch. Dig.*, Art. 978.

⁴ *Hall v. Dotson*, 55 Tex. 522.

them by this court, either expressly or by necessary implication, define the respective powers of the husband and wife, over her separate property, we must look to them, and not to either the common law or equity systems, further than they may serve to illustrate a question of doubtful construction."

§ 10. Definition—Constitution.—*California*.—The Constitution provides as follows :

"All property, both real and personal, of the wife, owned or claimed before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."¹

The Constitutions of 1849, 1863, contained similar provisions :

"All property, real and personal, owned by either husband or wife, before marriage, and that acquired afterwards by gift, devise, or descent, shall be their separate property."²

In Texas the Constitution provides as follows :

"All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as that held in common with her

¹ Constitution of 1879, Sec. 8, Art. XX.

² Constitutions of 1849, 1863, Sec. 14, Art. XI.

Nevada.—Constitution, Sec. 31, Art. IV.

husband. Laws shall also be passed, providing for the registration of the wife's separate property."¹

§ 11. Definition—The Statutes.—*California.*—(a) *Before the Code.*—The Act of April 27th, 1850, was the first statute in California defining the rights of husband and wife. Except in a few particulars it contains a "clear and succinct statement of the Spanish law respecting the property of husband and wife."² Section 1 provides as follows: "All property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property."³

(b) *Under the Code.*—Section 162, Civil Code, provides as follows: "All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property."⁴ The wife, when she claims separate property, must show that she owned it before marriage, or that she acquired it afterwards by gift, devise, or descent.⁵

A married woman in possession of property pending an action of ejectment against her husband will be presumed, in the absence of proof of a separate property in herself, to be in possession under her husband.⁶ In a suit for the recovery or conversion of her separate property she must allege in her complaint, by distinct

¹ Constitutions 1845, 1861, 1866, Sec. 19, Art. VII; Constitution 1876, Sec. 15, Art. XVI.

² *Panaud v. Jones*, 1 Cal. 514.

³ *Stats.* 1850-3, p. 812.

⁴ *Nevada.*—Compiled Laws, 151.

⁵ *Bessie v. Easle*, 4 Cal. 200.

⁶ *Huerstal v. Munio*, 1 West Coast Reporter, 475.

affirmative allegations, that the title to the property is in her as her separate property, or that she is possessed of it as her separate property as a sole trader or otherwise.¹

Texas.—In 1840 an act was passed, limiting separate property to lands and slaves and the increase of such slaves, and to the wife's paraphernalia. Under this act it was held that a wagon and cattle owned by the wife before marriage became common property.² Previous to this statute of 1840 there had been no such limit. In 1848 the law was restored as it had been previous to 1840, and has ever since read as follows: "All property, both real and personal, of the husband or wife, owned or claimed before marriage, and that acquired afterwards by gift, devise, or descent; as also the increase of all lands and slaves thus acquired, shall be separate property."³

There is no distinction between the separate property of the wife and property limited to her sole and separate use. Separate property is regarded as limited to her sole and separate use.⁴

§ 12. Gifts.—*California.*—Property conveyed to the wife during coverture, by way of gift, becomes her separate property.⁵ The husband can make a gift to the wife of either his separate or of the community property, and it will become her separate property.⁶ A conveyance was

¹ *Thomas v. Desmond*, 63 Cal. 426.

² *Portis v. Parker*, 22 Tex. 701.

³ *Pasch. Dig.*, Art. 2641; *Rev. Stats.* 2851; *Fitts v. Fitts*, 14 Tex. 449.

⁴ *Cartwright v. Hollis*, 5 Tex. 153.

⁵ *Hart v. Robertson*, 21 Cal. 346; *Lewis v. Johns*, 24 Cal. 98; *Peck v. Vandenberg*, 30 Cal. 11; *Dow v. Gould & Curry S. M. Co.*, 31 Cal. 629; *Woods v. Whitney*, 42 Cal. 358; *Higgins v. Higgins*, 46 Cal. 259.

⁶ *Kohner v. Ashenauer*, 17 Cal. 582; *Peck v. Brummagim*, 31 Cal. 445.

made to the wife, in consideration of a debt due, to the community from the grantor, with the consent of the husband, and with the intent that the property conveyed should become the separate property of the wife. It was held a purchase by the husband and a *gift* by him to the wife.¹ A deed was made to a married woman, conveying the property to her "as her separate property and to and for her separate use," the consideration being paid by the husband. It was held that the property became her separate property.² The husband, at his own instance, expended money in building a house on the land of his wife. It was held that the house became her separate property.³ But the wife can not hold the property so given to her exempt from the husband's debts, if they existed against him at the time of the transfer.⁴

Texas.—It is competent for the husband to make a gift to his wife, and she will hold the property as her own. This rule applies equally to community and separate property.⁵ He can make a gift or grant to her without the intervention of trustees.⁶ A deed from the husband to the wife that purports to be for a valuable consideration will be upheld as a gift if it be shown that it is really without consideration.⁷ When

¹ *Read v. Rahm* 3 West Coast Reporter, 150.

² *Swain v. Duane*, 48 Cal. 358.

³ *Barker v. Koneman*, 13 Cal. 9; *Peck v. Brummagim*, 31 Cal. 445; *Hussey v. Castle*, 41 Cal. 241; *Kane v. Desmond*, 63 Cal. 464.

⁴ *Peck v. Brummagim*, 31 Cal. 445.

⁵ *Stafford v. Stafford*, 41 Tex. 115; *Fisk v. Flores*, 43 Tex. 340; *Zorn v. Tarver*, 45 Tex. 519; *Peters v. Clements*, 46 Tex. 119; *Post*.

⁶ *Reynolds v. Lansford*, 16 Tex. 286; *Story v. Marshall*, 24 Tex. 305; *Smith v. Boquet*, 27 Tex. 507; *Hall v. Hall*, 52 Tex. 299; *Fitts v. Fitts*, 14 Tex. 443.

⁷ *Hartwell v. Jackson*, 7 Tex. 576.

land is purchased in the name of the wife and the note of the husband executed for the purchase price, the wife is not liable on this note,¹ as the property is presumed to be his.

A conveyance by way of gift from a husband to his wife can be questioned only by subsequent purchasers from the husband without notice, and by existing creditors.² As to them it is not necessarily fraudulent and void. It might be a badge of fraud, a circumstance to be considered in determining whether the intent was fraudulent, if it were shown that the husband was heavily in debt at the time of the gift. But it does not follow because a man may be indebted to an inconsiderable or even a considerable amount at the time, that he can not settle a part of his property upon his wife or children, provided he retains an ample amount of property to liquidate his debts.³ It is incumbent on the wife, when she claims that her husband has made a gift to her of community property, to show that fact, and that at the time of the gift the husband had left in his hands ample property, subject to execution, to pay all his debts.⁴

§ 13. Laws of what State govern?—If husband and wife acquire personal property in one State and then remove to California or Texas with the same, the law of the State in which it was acquired (such being the State of their domicile) governs as to the ownership of such

• ¹ *Farr v. Wright*, 27 Tex. 96.

² *Reynolds v. Lansford*, 16 Tex. 286; *Raymond v. Cook*, 31 Tex. 373; *De Garca v. Galvan*, 55 Tex. 56.

³ *Van Bibber v. Mathis*, 52 Tex. 407; *Morrison v. Clark*, 55 Tex. 444.

⁴ *Braden v. Gose*, 57 Tex. 41.

property.¹ If, however, the place of such acquisition is not the matrimonial domicile, this rule does not obtain. A man with his family left Mississippi with the intention of settling in Texas. While *en route* to Texas, he stopped for a short time in Tennessee, at the home of his wife's parents. While there the father of his wife presented her with a slave, which she took with her to Texas. It was held that the laws of Texas, not those of Tennessee, controlled as to the ownership of this slave.² In this case the court held that the law of the intended domicile governed, there being no actual domicile. The court intimated that the same rule obtained when a woman marries, intending to go immediately to the home of her husband in another State, or when property is acquired by husband or wife, both of whom intend, at the time of such acquisition, to remove to another State.

It has been held in California that the capacity of a married woman, domiciled and residing in California, to acquire, hold, and enjoy property, is regulated, during such residence, by the laws of California, and not by the laws of the State where the marriage contract was performed.³ The same rule prevails in Texas.⁴

§ 14. Increase and profits of separate property.—*California*.—Section 9 of the Act of 1850 provided as follows: "The rents and profits of the separate property of either husband or wife shall be deemed common property."⁵

¹ *Dye v. Dye*, 11 Cal. 168; *Kraemer v. Kraemer*, 52 Cal. 302; *Hill v. McDermott*, *Dallam* (Tex.) 422; *Edrington v. Mayfield*, 5 Tex. 363.

² *State v. Barron*, 14 Tex. 179.

³ *Dow v. Gould & Curry S. M. Co.*, 31 Cal. 680.

⁴ See authorities in note 1, § 13.

⁵ *Stats.* 1850-3, 812.

This provision was held in conflict with the Constitution and therefore void,¹ the court saying:² "We think the legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her and given to the husband or his creditor.

"This term 'separate property' has a fixed meaning in the common law, and had in the minds of those who framed the Constitution, the large majority of whom were familiar with, and had lived under that system. By the common law, the idea attached to separate property in the wife, and which forms a part of its definition, is, that it is an estate, held as well in its use as in its title, for the exclusive benefit and advantage of the wife. . . . It is not perceived that property can be in one, in fixed and separate ownership, with a right in another to control it and enjoy all its benefits."

In this case the question had arisen as to the ownership of the dividends upon some shares of stock owned separately by the wife, and it was held that they were her separate property.

In *Lewis v. Johns*³ there was the following state of facts: A married woman lived with her husband on a farm owned separately by her. The farming business was carried on ostensibly in the name of the husband. He employed men, purchased seed wheat, made contracts to be paid out of the growing crop, superintended the farm labor, and performed work himself. It was held that the husband thereby acquired no interest in the fruits and profits of her farm, the court saying:

¹ *Selover v. American R. C. Co.*, 7 Cal. 273; *George v. Ransom*, 15 Cal. 324; *Spear v. Ward*, 20 Cal. 674; *Lewis v. Johns*, 24 Cal. 98; *Beaudry v. Felch*, 47 Cal. 183.

² *George v. Ransom*, 15 Cal. 324.

³ *Lewis v. Johns*, 24 Cal. 98.

“Under that doctrine (of *George v. Ransom*, *supra*) all property which can be shown to belong to the separate estate of the wife, by satisfactory testimony, whether the same be real, personal, or mixed, and all the rents, issues, profits, and increase thereof, whether the same be the fruits of trade or commerce, of loans and investments, or the spontaneous productions of the soil, or wrested from it by the hand of industry, is, under the Constitution, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband.

“The wife’s right of property in her separate estate, after coverture, is co-extensive with that which she possessed as a *feme sole*, and the legislature may, as it has done, enact laws for its further assurance (by throwing safeguards around the *jus disponendi*), but can not legislate so as to impair it in any degree.

“It follows from what has already been said that the husband can not, by any independent act of his, acquire an interest in the separate estate of his wife. It is even doubtful whether the legislature can confer upon him, against her consent, a dominion over her property sufficient for the purpose of management or control. However that may be, it can not go beyond that point, as we have already seen. That the husband can not, by his management, supervision, or labor, acquire any interest in the estate itself is conceded, and by parity of reasoning, he can not acquire any interest in the increase, for that is her’s also, and upon the same terms—the latter being a corollary of the former proposition.”

Where a man married in 1854, then possessed of separate property, cattle, horses, and money, valued at twenty thousand dollars, and died in 1859, possessed of

cattle, horses, and money, valued at forty thousand dollars, and his sole business at his marriage, and from thence until his death, was dealing in stock of that kind; and the stock at his death consisted of about four thousand dollars' worth of the original stock possessed at the time of his marriage, and the balance consisted of the increase of such stock, together with other stock bought with the proceeds of sale of original stock: Held, that as the deceased was engaged in no other business except *dealing* in stock from his marriage to his death, the fair inference is that the common property is the difference between the original value of his property at his marriage and the value of the property possessed at the time of his death, less the *community debts*.¹

We do not think this decision in accord with the views of the same court, as expressed both prior and subsequently to its rendition. The property declared to be common, consisted of stock that was the *increase* of their separate property, together with stock that was simply the *investment* of a part of his separate property. This constituted separate property.

In *Smith v. Smith*, 12 Cal. 224, the court, in speaking of the proof required to rebut the presumption that property acquired during coverture is community property, said that this presumption could be repelled only by clear and decisive proof that it was either owned before marriage, or was subsequently acquired by gift, bequest, devise, or descent, or *was taken in exchange for, or in the investment, or as the price of such property so originally owned or acquired*.

In *Lewis v. Johns*, 24 Cal. 98, the court said: "All

¹ *Lewis v. Lewis*, 18 Cal. 654.

property, which can be shown to belong to the separate estate of the wife, by satisfactory testimony, whether the same be real, personal, or mixed, and all the rents, issues, profits, and *increase* thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry, is, under the Constitution, sacred to the use and enjoyment of the wife."

The same rule applies to the husband. The rights of husband and wife, in their respective separate estates, are equal. The Code has adopted the rule as formulated in *George v. Ransom* and *Lewis v. Johns* (*supra*), providing that all property owned by either husband or wife, before marriage, and that acquired afterwards by gift, bequest, devise, or descent, *with the rents, issues, and profits thereof*, is separate property.¹

In *Estate of Higgins* the facts were as follows: Higgins, at the time of his marriage in Illinois, was the owner of a farm, stock and utensils thereon, and other personal property in said State. From the time of the marriage he lived with his family on the farm, tilled and cultivated it, raised live stock thereon, purchased live stock, which he raised and fattened with the products raised by him on the farm, and from time to time sold portions of such live stock and farm products. Subsequent to the marriage he expended large sums of money in the construction of a dwelling and other improvements on the farm. Later on he sold the said farm and personal property, with the buildings and improvements, and the increase and profits of said property

¹ Civil Code, 162, 163.

and of his labor and industry, converted the same into money, came to California, and purchased, and, out of said money, paid for certain real property. After his death his widow claimed that this was community property. The court, without deciding as to whether the laws of Illinois or of California would govern in such a case, said: "It is sufficient to say that it does not appear, even when measured by the law of this State, that the real estate mentioned in the petition was community property. It does not appear, what part, if any, of the purchase money was the product of the labor or industry of the decedent after the marriage. It does not appear that the petitioner offered to show what portion, if any, of the purchase money was earned by the husband during the coverture. On the contrary it would seem from the findings that all the accumulations after the marriage were the result of the ordinary use by him of the property which he owned at the time of his marriage with the petitioner."¹

¹ Estate of Higgins, 3 West Coast Reporter, 358.

Nevada.—Stats. 1864-5, p. 239; Compiled Laws, 151 (same as in California); *Lake v. Lake*, 4 West Coast Reporter, 159. *Lake v. Lake*, is a very important case. The following are the facts of the case as found by the trial court: All the property owned by the husband, except that owned by him at the time of the marriage, was "acquired by him by purchase or exchange, part by actual barter or exchange for real property owned by him at the time of marriage, and all the balance by purchase with moneys arising from sales and rents of separate real estate and personal property, tolls arising from separate property, and interest received from loans of moneys that belonged to defendant alone, all of which was held to be separate property." At the time of the marriage he "owned a toll road and bridge, and collected tolls thereon, conducted the Lake House Hotel, and a merchandise business therein, cultivated some lands, and had certain moneys at interest." "After the marriage he conducted and maintained the same toll road and bridge, and collected tolls about seventy-five thousand dollars net." During all the time of the marriage he was also engaged "in loaning money at interest, collecting interest money, renting buildings and lands of his separate estate, selling such lands and investing the proceeds of such interest,

Texas.—The statute, until the abolition of slavery, provided that the *increase of lands and slaves* that were separate property should also be separate property. As there are no longer any slaves, the law may be stated

sales, and rents in loans, purchase of other lands, and in the construction of buildings."

Immediately after the marriage he and his wife commenced to reside at the Lake House Hotel, and he conducted the hotel business until the fall of 1868, when he rented the hotel until January, 1870, at which time he resumed possession and again conducted the business thereof. In 1866, he kept a hotel at Meadow Lake, California, for four or five months, and constructed certain buildings necessary for use, which were destroyed by fire. There was no profit to the hotel business at either place.

After 1871 he conducted farming operations on the Lake ranch, consisting of nine hundred and seven acres of improved land, thirty-three acres of which had been acquired in exchange for other land owned by him before marriage, and the rest by purchase since marriage, the purchase money being the rents, issues, and profits of other property.

In ruling upon this state of facts, the court said: "It is admitted that all property described in the complaint (an action by the wife for divorce on the ground of cruelty) which was owned by defendant before marriage, remains his. It is equally true that property purchased with or taken in exchange for such property is his also, as well as the rents, issues, and profits of his separate estate. But the question arises, what are properly *rents, issues and profits* under the facts proven. . . . The subject is beset with difficulties which must be met as the cases present themselves, and each must be decided upon its own, its peculiar facts. . . . We are satisfied that it is not necessary to prove that property is, in fact, the product of the *joint* efforts of the husband and wife in order that it may be declared community estate. If it is acquired after marriage by the efforts of the husband alone, but not by gift, devise, or descent, or by exchange of his individual property, or from the rents, issues, or profits of his separate property, it belongs to the community. Such property is common, although the wife neither lifts a finger nor advances an idea in aid of her husband. She may be a burden and a detriment in every way, or she may absent herself from the scene of his labors, know nothing of his business and do nothing for him; still it is common.

"Under our statute the sole question is, whether property claimed by either spouse belonged to him or her at the time of marriage, or has since been acquired by gift, devise, or descent, or has come from the rents, issues, or profits of separate estate. And in this or any other case, if profits come *mainly* from the *property* rather than the *joint efforts* of the husband and wife, or either of them, they belong to the owner of the property, although

now to be that the increase and profits of separate property become community property, with the single exception of the "increase of lands."¹ The Constitution of 1869² made a change in the law in this regard. It provided as follows: "The rights of married women to their separate property, real and personal, *and the increase of the same* shall be protected." This was changed by the amendments of 1876, and the law restored as above stated.³

Examples.—The increase of cattle and horses (separate property) belongs to the community,⁴ as also do the products and profits accruing from the use, as well as the money realized from the hire of the wife's personal property.⁵ The accumulated profits arising from personal property conveyed to husband and wife as trustees to be used for the support of themselves and children,

the labor and skill of one or both may have been given to the business. *On the contrary, if profits come mainly from the efforts or skill of one or both, they belong to the community.* It may be difficult in a given case to determine the controlling question, owing to the equality of the two elements mentioned, but we know of no other method of determining to whom profits belong. In the use of separate property for the purpose of gain, more or less labor or skill of one or both must always be given, no matter what the use may be; and yet the profits of property belong to the owner, and in ascertaining the party in whom the title rests, the statute provides no means of separating that which is the product of labor and skill from that which comes from the property alone." The court accordingly held that the profits of the *hotel*, whether derived from running it or from renting it, from the *toll road and bridge*, and from the *ranch* he cultivated, belonged to the husband, such profits coming from the ordinary use of his individual property, and affirmed the judgment of the lower court.

¹ *Ante*; Magee v. White, 23 Tex. 191; McIntyre v. Chappell, 4 Tex. 187; Love v. Robertson, 7 Tex. 6; Cartwright v. Cartwright, 18 Tex. 626.

² Sec. 14, Art. XII.

³ De Garca v. Galvan, 55 Tex. 56.

⁴ Howard v. York, 20 Tex. 670; Bateman v. Bateman, 25 Tex. 270.

⁵ Carr v. Tucker, 42 Tex. 337; Cox v. Miller, 54 Tex. 27; Marx v. Lange, 61 Tex. 547.

after supplying the said use, were held to be community property.¹ Profits arising from a mercantile business carried on by husband and wife during the marriage belong to the community.² Land was purchased by a married woman, the consideration paid being twelve hundred dollars. This amount consisted of \$800, her separate property, and \$400. that was interest collected by loaning the \$800. The land was sold under an execution against the husband. It was held that the land was community property to the extent of the \$400. paid for it, and to that extent was subject to sale under execution against the husband.³

An apparent (but only apparent) exception to the rule laid down in this case (*Braden v. Gose*) is found in a very recent case.⁴ A married woman sold certain lands for \$15,000, receiving \$10,000 in cash and a note for \$5,000. The principal *and interest* of this note were especially agreed upon to be paid for the land which was her separate property, the *interest* having been especially contracted for in the deed of conveyance, and agreed to be a lien upon the land as a *part* of the *purchase money*, as much a part of the original purchase money as the principal of the note was. A judgment creditor of the husband attempted to subject this *interest* to his judgment, upon the ground that it was community property. It was held that this interest, not being the increase of the wife's property, but a part of the proceeds of separate property, was also separate property and therefore not subject to the husband's

¹ *Fitzpatrick v. Pope*, 39 Tex. 315.

² *Braden v. Gose*, 57 Tex. 37; *Heidenkeimer v. Felker*, Tex. Court of Appeals (Civil Cases), § 362.

³ *Braden v. Gose*, 57 Tex. 41.

⁴ *Carlisle v. Sommer*, 61 Tex. 124.

debts. The court said: "The superior right still remained, by the terms of the contract, with the vendor until all the interest, as well as the principal of the purchase money was paid. When this was done, and the terms of the sale in every respect fully complied with, and the principal and interest alike paid, then, as was held in the case of *Braden v. Gose*, cited *supra*, any future interest accruing from the loan of this purchase money would be community property and subject to attachment, garnishment, or execution, as the case might be."

In a prior case¹ it had been held that the interest due upon a note made to the wife by the husband was her separate property, upon the ground that the husband's contract made it so.

It has been held that lumber sawed at the wife's mill, out of timber grown on the wife's land, and by the labor of her slaves, belongs to the community,² as also do crops grown on her land, although the entire expense of their cultivation is paid out of her separate funds.³ In California such would be considered as the "increase of lands." The Supreme Court of Texas, in *De Blane v. Lynch* (*supra*), thus construes this phrase, "*increase of lands*":

"In an etymological sense, it cannot be doubted, that the word 'increase,' as applied to land, or to the soil, means that which grows out of it, or that which is produced by the cultivation of it. . . . But to adopt this meaning of the word 'increase,' as used in our

¹ *Hall v. Hall*, 52 Tex. 298.

² *White v. Lynch*, 26 Tex. 195.

³ *De Blane v. Lynch*, 23 Tex. 25; *Seligson v. Staples*, Tex. Court of Appeals (Civil Cases), § 1071; *Holland v. Seward*, Tex. Court of Appeals (Civil Cases), § 944.

statute, and to interpret the statute accordingly, would, we think, lead to results wholly inconsistent with the recognized principles of law upon which the system of community property is based. It would also lead to results inequitable and unreasonable. If it be admitted, that the 'increase of land' meant by our statute, is the product of the soil itself, then it would follow, that a crop grown on the land of the husband, by the labor of the slaves of the wife, would be the separate property of the husband, because it was the 'increase' of his land. The husband has by the statute the control and management of the separate property of the wife; and if the husband owned land, as separate property, and the wife owned slaves, as separate property, the husband could always employ the wife's slaves in the cultivation of his own land, and thus add to his separate property by the use of her separate property.

"The principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property. It is true, that in a particular case, satisfactory proof might be made, that the wife contributed nothing to the acquisitions, or, on the other hand, that the acquisitions of property were owing wholly to the wife's industry. But from the very nature of the marriage relation, the law cannot permit inquiries into such matters. The law, therefore, conclusively presumes that whatever is acquired, except by gift, devise, or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry. If a crop is made by the labor of the wife's slaves on the wife's land, it is community property, because the law presumes that the husband's skill or

care contributed to its production ; or, that he, in some way, contributed to the common acquisitions.”¹

§ 15. A change in the form or nature of separate property does not change its character.—It may undergo changes without losing its character as separate property, but it must be clearly and indisputably traced through all its changes.² The rule is very well expressed in a recent decision, as follows: “It matters not how many mutations the separate money of the wife may have undergone, how often it has been invested in personal or real property; how often it has been loaned, collected, and reinvested ; as long as the substance thereof can be traced and identified as the result of the money, it is her separate property.”³

Negroes purchased during the marriage with money due at the time of marriage from the sale of land owned by the husband were held to be separate property.⁴ A promissory note given to a married woman in payment for land of her's, is her separate property,⁵ as is also a promissory note, executed by a husband to his wife, in consideration of her separate money loaned to him.⁶

Where a purchaser agreed to pay to the wife \$6,000

¹ *Magee v. White*, 23 Tex. 191; *Forbes v. Dunham*, 24 Tex. 611.

² *Ramsdell v. Fuller*, 28 Cal. 37; *Peck v. Vandenburg*, 30 Cal. 11; *Hussey v. Castle*, 41 Cal. 241; *Schuler v. Savings and Loan Society*, 64 Cal. 397; *Schneider v. Fowler*, Tex. Court of Appeals (Civil Cases), § 856; *Rose v. Houston*, 11 Tex. 326; *Chapman v. Allen*, 15 Tex. 278; *Williams v. Turner*, 50 Tex. 148.

³ *Montgomery v. Brown*, Tex. Court of Appeals (Civil Cases), § 1303; *Marx v. Lange*, 61 Tex. 547.

⁴ *McIntyre v. Chappell*, 4 Tex. 187; *Love v. Robertson*, 7 Tex. 11.

⁵ *Hamilton v. Brooks*, 51 Tex. 142; *Morris v. Edwards*, Tex. Court of Appeals (Civil Cases), § 548.

⁶ *Price v. Cole*, 35 Tex. 461; *Hall v. Hall*, 52 Tex. 299.

for a certain piece of land, and to the husband \$2,000 for his signature to the deed, it was held that the wife could recover this amount agreed to be paid to the husband as a part of the consideration for the sale,¹ and where property was conveyed to the husband, and the consideration was paid out of the separate estate of the wife, it was held that the premises became her separate property, and that the husband became a trustee for her.²

The bankruptcy of the husband has no effect upon the separate estate of the wife. This was held in *John v. Battle*, 58 Tex. 593. The husband bought a tract of land and gave his note for the purchase money, and paid these notes in part with the funds of his wife's separate estate, held in trust by him for her benefit under her father's will. Afterwards he went into bankruptcy and scheduled the land as his property. At the assignee's sale of the land notice was given by the wife that she claimed an interest in the land by reason of the money of her's so contributed towards the purchase price of the land. Afterwards she brought suit for partition against the purchasers at such sale, who resisted her claim. The Court said: "The assignment in bankruptcy by her husband did not have the effect to pass any greater interest in the land than was owned by him as his separate property, and that which he held in community with his wife. Her rights in the land in virtue of her separate estate were not affected by virtue merely of the bankrupt proceedings against her husband, and the purchasers under the bankrupt sale

¹ *Beaudry v. Felch*, 47 Cal. 183.

² *Ingersoll v. Truebody*, 40 Cal. 603; *Rich v. Tubbs*, 41 Cal. 34.

did not acquire her interest, unless they did so as purchasers without notice of the existence of that interest."

§ 16. Registration of the separate property of the wife.—*California.*—(a) *Before the Code.*—Sections 3, 4, and 5 of the Act of 1850¹ provide for the filing of an inventory of the wife's separate property, signed and acknowledged by the wife, in the county of her residence and also in each county in which any real estate may be situated, and that "the filing of the inventory in the Recorder's office shall be notice of the title of the wife, and all property belonging to her, included in the inventory, shall be exempt from seizure or execution for the debts of the husband.

(b) *Under the Code.*—Sections 165 and 166 of the Civil Code provide as follows: "A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the Recorder of the county in which the parties reside."

"The filing of the inventory in the Recorder's office is notice and *prima facie* evidence of the title of the wife." It will be observed that the real estate of the wife is no longer to be included in this inventory. The title to real property is supposed to be of record.²

¹ Stats. 1850, p. 812.

² *Nevada.*—An inventory of the wife's separate property must be filed in the Recorder's office of the county in which she resides, and also in every county in which there is any real estate belonging to her. If she is not a resident of the State, this inventory must be filed in every county in which any of her property, real or personal, is situated, located, or used. Money in specie, and the rents, issues, and profits of separate property (while in specie and unconverted) need not be included in the inventory. Supple-

Texas.—"All property, real and personal, which may be owned or claimed at the time of marriage by any woman, or which she may acquire after marriage by gift, devise, or descent, shall be registered as herein provided. She must present to any officer authorized to take acknowledgments a schedule of her property, and make a statement under oath that she claims the same as her separate property. Upon such statement being made, the officer must annex to the schedule his certificate to this fact. This certified schedule must be recorded in the county where the real property is situated, and also in the county where the personal property is situated, if there is any personal property. Such a registration shall be conclusive against all subsequent creditors and purchasers from her husband." ¹

§ 17. Rule of construction as to registration.—The capacity to acquire and hold her separate estate is created by the Constitution, and her title to her separate estate depends alone upon the mode of its acquisition, and rests in her before the inventory can be filed.

The legislature does not possess the constitutional power to declare that the title of the wife to her property shall be divested for want of registration, or that, for that reason, it shall be subjected to the debts of the husband or of any other person whomsoever.²

mentary inventories must be filed from time to time as additional property is acquired. This inventory, when so filed, is notice to the world of the wife's title. The failure to file it as required by law makes a *prima facie* case against her as between her and innocent purchasers for value of her property from her husband. (Compiled Laws, 153-155.)

¹ Revised Stats., 4343-4349.

² *Dickinson v. Owen*, 11 Cal. 71; *Selover v. American B. C. Co.*, 7 Cal. 272; *Edrington v. Mayfield*, 5 Tex. 363; *Parks v. Willard*, 1 Tex. 352; *Le Gierse v. Moore*, 59 Tex. 470; *Schneider v. Fowler*, Tex. Court of Appeals (Civil Cases), § 857.

The fact that the wife causes property to be registered can not make it her separate property, if it is not so in fact, for the only object of registration is to give notice of what is separate property, and it can not in any respect change the character of property.¹

Personal Property.—It has been held in Texas that the law regarding the registration of the wife's separate property does not apply to personal property.²

§ 18. Management of the separate property of the wife.—*California.*—(a) *Before the Code.*—The husband, under sections 6 and 9 of the Act of 1850,³ had the management and control of both the community property and the separate property of the wife, with the like absolute power of disposition of the former as of his separate estate. The court, as we have seen, released the rents, issues, and profits of the wife's separate estate from this power of disposition on the part of the husband, and threw a doubt over his right to control and manage her separate estate.⁴

The case of *Lewis v. Johns*⁵ is an important one, as showing the extent of the husband's rights under the first clause of section 6, viz.: "The husband shall have the management and control of the separate property of the wife during the continuance of the marriage." The facts of the case were these: The farming business was carried on by the husband on the farm belonging to the wife. He employed the men, purchased seed wheat, made contracts to be paid out of the proceeds of

¹ *Braden v. Gose*, 57 Tex. 41.

² *Schneider v. Fowler*, Tex. Court of Appeals (Civil Cases), § 857.

³ *Hittell's General Laws*, 3568.

⁴ *Ante*.

⁵ 34 Cal. 629.

the growing crop, superintended the farm labor, and performed some labor himself. The court held that the husband can not, by his management, control, supervision, or labor, acquire any interest in the wife's separate estate or the fruits thereof, and that, in the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate him for his services. The husband managed the separate property of the wife *as* her separate property, and she was entitled to enjoy the income.¹ He was the agent appointed by law for the management of her separate estate, and, as such, he could, in order to protect her separate estate from forced sale, pay a judgment obtained against her, and this payment, as to third persons, was held a payment by her.² This right to control and manage her separate estate did not give him the right to sell it or any part of it.³

To protect the wife from the improvidence or recklessness of the husband, it was provided in section 8 of this Act that "if the wife has just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste, her separate property, she, or any person in her behalf, may apply to the District Court for the appointment of a trustee to take charge of and manage her separate estate."⁴

(b) *Under the Code.*—Section 177, Civil Code, provides that the property rights of husband and wife are governed by the provisions of Chapter 3, Title 1, Part 1 of that Code. There is nothing therein giving the hus-

¹ *Wilson v. Wilson*, 36 Cal. 447.

² *Drois v. Hogan*, 50 Cal. 14.

³ *O'Brien v. Foreman*, 46 Cal. 81; *Dickson v. Owens*, 11 Cal. 71.

⁴ *Mahone v. Grimshaw*, 20 Cal. 176.

band any right to control or manage his wife's separate property. The whole tenor of the chapter is to make her entirely independent of him in all matters affecting her property rights.¹

Texas.—Although the husband has the sole management of the separate property of the wife,² during the marriage, yet he has the authority of management only. He has this management of the estate of the wife, and the incidents essential to the due exercise of such authority, not for his own benefit, but for that of the community, or of her estate.³ His dealings with her separate property are always to be closely scrutinized, and they will not be upheld when there is even slight evidence of fraud or undue influence, nor can they be supported when they fail in the absolute requirements of the law.⁴ He can convey, by endorsements, notes made payable to her.⁵ A deed duly executed by him with attesting witnesses, conveying to her real property, it being his intention that the title to the land should immediately vest in her, need not be delivered to her. His possession of the deed, under the law giving him the management and control of her property, makes a delivery to her unnecessary, at least as against him or their heirs.⁶ His joining with her in the execution of a note for the purchase of prop-

¹ *Nevada.*—This is equally so in Nevada. Sections 151 to 185 (inclusive) of the Compiled Laws is almost a copy of this chapter of the California Code, and section 176 of the Compiled Laws contains a similar provision to that found in section 177 of the Civil Code of California.

² Rev. Stats. 2851; Pas. Dig. 4641; *Cox v. Miller*, 54 Tex. 26.

³ *McKay v. Treadwell*, 8 Tex. 180; *Howard v. North*, 5 Tex. 299.

⁴ *Rose v. Houston*, 11 Tex. 324; *Reagan v. Holliman*, 34 Tex. 412.

⁵ *Hemmingway v. Mathews*, 10 Tex. 207; *Wells v. Cockrum*, 13 Tex. 127.

⁶ *Brown v. Brown*, 61 Tex. 56.

erty by her is ample, full, and complete proof of the consent required in his management of her property.¹

But though he is her agent in the management of her separate estate, yet, in transactions between themselves in reference to property rights, she must be entitled to exercise her own will. He can not be his wife's agent to make a contract with himself.²

It is the duty of the husband to manage the wife's separate property and support the family. While he continues to discharge these duties, a sale of her separate property can not be made without the joint consent of both, her consent to be authenticated upon privy examination by an officer duly authorized by law.³ But, when he abandons his wife, ceases to support his family, and leaves her to discharge *his* duties as *head* of the *family*, she acquires the corresponding powers, and can manage and dispose of her separate property without his concurrence.⁴ The rights and powers of the wife in such a case arise from the *fact* of abandonment, and not from the *length* of its *continuance*. It must, however, be apparently a permanent desertion.⁵

A married woman separated from her husband for several years, and apparently finally separated, managed her own business as a *feme sole*, and executed her note for a bill of furniture she had purchased. It was

¹ *George v. Stevens*, 31 Tex. 674.

² *Pearce v. Jackson*, 61 Tex. 646.

³ *Tucker v. Carr*, 39 Tex. 51; *T. and P. Ry. Co. v. Durrett*, 57 Tex. 51; *G. C. and S. F. R. Co. v. Donahoo*, 59 Tex. 131.

⁴ *Walker v. Stringfellow*, 30 Tex. 573; *Blanchet v. Dugat*, 5 Tex. 507; *Wright v. Hays*, 10 Tex. 130; *Cheek v. Bellows*, 17 Tex. 613; *Fullerton v. Doyle*, 18 Tex. 4; *Davis v. Saladee*, 57 Tex. 326; *Harris v. Williams*, 44 Tex. 124.

⁵ *Rosenbaum v. Hasloe*, Tex. Court of Appeals (Civil Cases), 849.

held that she was, under such circumstances, fully authorized to bind herself by such a contract.¹

A married woman had been separated from her husband for two years when she executed a power of attorney to her agent, without her husband joining in the execution thereof. This power of attorney authorized the agent to take general charge of her real estate, to rent it and collect the rents, to make all necessary repairs, and to do all things necessary and proper in the premises. The agent made a contract for some repairs, and a mechanics' lien was filed thereunder. This lien was sustained, the court saying: "The testimony was sufficient to authorize the court below to find that the absence of the husband was not temporary in its nature, but was of such character as to require the wife, for her own protection, to be vested with power to manage and control her separate property."²

Should the husband fail or refuse to support his wife from the proceeds of the lands she may have, or fail to educate her children as the fortune of the wife would justify, she may, in either case, complain to the court, which may decree that so much of such proceeds shall be paid to the wife for the support of herself and for the nurture and education of her children, as the court may deem necessary.³

§ 19. A married woman's right to make a contract for the payment of money.—*California*—(a) *Before the Code*.—At common law, as we have seen, the civil existence of the wife was merged in that of the husband; she could

¹ *Davis v. Saladee*, 57 Tex. 326.

² *Wright v. Blackwood*, 57 Tex. 647.

³ *De Blane v. Lynch*, 23 Tex. 29; *Magee v. White*, 23 Tex. 191; Rev. Stats. 2856.

make no contract. This rule of law obtained in California, even after the passage of the Act of 1850. The wife was incapable of contracting a personal obligation. Her disability in this respect, arising from her coverture, existed in this State as at common law.¹ A promissory note executed by the husband and wife was the note of the husband alone.² But coverture did not of itself render a personal judgment against a married woman void. If she desired to rely on it as a defense, she had to plead it.³ If, notwithstanding, it was set up by her as a defense, a personal judgment was rendered against her, the judgment was not void, but was valid until reversed.⁴

(b) *Since the Code*.—Section 167 of the Civil Code, as originally enacted, provided that a wife could not make a contract for the payment of money.⁵ This provision was repealed July 1, 1874. Section 171 of the Civil Code provides that the separate property of the wife is liable for her own debts, contracted before or after marriage. Section 1556, Civil Code, provides that all persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights. These two sections, since the repeal of Section 167, *supra*, give a married woman unlimited power in the matter of contracts for the payment of

¹ *Rowe v. Kohle*, 4 Cal. 285; *Simpers v. Sloan*, 5 Cal. 458; *Poole v. Gerrard*, 6 Cal. 73; *Luning v. Brady*, 10 Cal. 268; *Shaver v. Bear River & Auburn W. & M. Co.*, 10 Cal. 396; *Spear v. Ward*, 20 Cal. 659; *MacLay v. Love*, 26 Cal. 367; *Smith v. Greer*, 31 Cal. 478; *Belloe v. Davis*, 38 Cal. 256; *Drais v. Hogan*, 50 Cal. 121.

² *Pfeifer v. Riehn*, 13 Cal. 643; *Brown v. Orr*, 29 Cal. 120; *Althof v. Conheim*, 38 Cal. 233; *Shartzer v. Love*, 40 Cal. 93.

³ *White v. Adams*, 52 Cal. 435.

⁴ *Gambette v. Brock*, 41 Cal. 78.

⁵ *Butler v. Baber*, 54 Cal. 178; *Brickell v. Batchelder*, 62 Cal. 623.

money.¹ Her contracts need not express an intention on her part to charge her separate estate, nor need it be alleged in any suit thereon that such contract was made for the benefit of her separate estate.²

This decision affirms the right of a married woman to bind herself by a promissory note, even if not given in a transaction respecting her separate property.

Texas.—The *wife* may contract debts for necessities furnished *herself* or *children*, and for all expenses which may have been incurred by *her* for the benefit of her separate estate. The debts so contracted and the expenses so incurred must be reasonable and proper. Execution for such charges may be levied upon the community property, or upon the wife's separate property, at the option of the plaintiff.³ She can contract such a debt without the consent of her husband.⁴ The debt must be contracted *by the wife personally* or by *her authorized agent*. The authority of any one to act for her as her agent must be clearly proved. The husband may be her agent for such a purpose, but his authority must be proved as clearly as in the case of a stranger. It must appear to the satisfaction of the court that such charges are reasonable and proper.⁵

The statute must be closely followed. The necessa-

¹ Marlow v. Barlew, 53 Cal. 461.

² Wood v. Orford, 52 Cal. 412. *Nevada*—Cartan v. Davis, 3 West Coast Reporter, 190.

³ Pasch. Dig. 4643; Rev. Stats. 1205, 2854, 2855.

⁴ Booth v. Cotton, 13 Tex. 359.

⁵ Christmas v. Smith, 10 Tex. 123; Milburn v. Walker, 11 Tex. 329; Brown v. Ector, 19 Tex. 346; McFaddin v. Crumpler, 20 Tex. 374; Gregory v. Van Vleck, 21 Tex. 40; Magee v. White, 23 Tex. 180; Haynes v. Stovall, 23 Tex. 626; Hutchinson v. Underwood, 27 Tex. 255; Perkins v. Baker, 38 Tex. 45; Harris v. Williams, 44 Tex. 124; Rosenbaum v. Harloe, Tex. Court of Appeals (Civil Cases), 850; Lee v. Crosby, Tex. Court of Appeals (Civil Cases), 140.

ries must be furnished for the *wife* or *children only*. The wife's separate property can not be made liable for necessities furnished for the *husband* or for the *family*, though at the wife's request, nor for necessities furnished *to the husband, for the family*. This rule is not affected by the fact that the husband is insolvent and there is no community property.¹ A married woman can not bind her separate estate by a simple contract, parol or in writing, express or implied, except for necessities furnished for herself or her children, or for the benefit of her separate estate. Her legal obligation, when incurred for such a purpose, is *in personam*, and execution may be issued against her as if she were a *feme sole*. Such an execution will reach all of her property. (Under the equity doctrine that for a while prevailed, the court could decree that execution be made first out of the proceeds, rents, and profits before the *corpus* of the property could be reached.)² She can make promissory notes for such a purpose, either alone or jointly with her husband.³

A married woman is liable for seaman's wages when earned on a vessel that is her separate property;⁴ she is liable for the rent of a house for herself and family, if the house was rented by her, her husband is insolvent, and there is no community property,⁵ but she is not liable on a joint note given by her husband and herself

¹ Magee v. White, 23 Tex. 180; Haynes v. Stovall, 23 Tex. 626; Trimble v. Miller, 24 Tex. 214; Hutchinson v. Underwood, 27 Tex. 255; Covingtons v. Burleson, 28 Tex. 368; Stansbury v. Nichols, 30 Tex. 145; Sorrel v. Clayton, 42 Tex. 188; Wallace v. Finberg, 46 Tex. 35.

² Haynes v. Stovall, 23 Tex. 625.

³ Hollis v. Francois, 5 Tex. 195; Hutchinson v. Underwood, 27 Tex. 255; Rhodes v. Gibbs, 39 Tex. 432.

⁴ Hance v. Antone, Tex. Court of Appeals (Civil Cases), § 800.

⁵ Harris v. Williams, 44 Tex. 124.

for the purchase price of property purchased in her name,¹ nor on a note for goods purchased to replenish her stock of goods and merchandise, as such a purchase is not, under the statute, an expense incurred for the benefit of her separate estate.² She is not liable for damages occasioned by the negligence of her husband or his servants on a ferry owned separately by her.³

In an action on a debt for which a married woman is liable under the statute, the plaintiff must allege and prove that the debt was contracted *by the wife for necessities for herself or children*, or that the expense was incurred *by her* for the benefit of her *separate property*, and that it was reasonable and proper. Unless these averments are made, a judgment against her is erroneous.⁴ A petition which alleges facts from which it is plainly inferable that the debt is one properly chargeable upon the separate property of the wife is sufficient upon general demurrer, although it does not distinctly allege that the debt was *reasonable*.⁵

The doctrine of *Miller v. Newton*,⁶ formerly prevailed in Texas. It was held that, independently of the statute, when the husband was insolvent, and there was no community property, the separate property of the wife could be made liable for necessities furnished for the

¹ *Lynch v. Elkes*, 21 Tex. 229.

² *Wallace v. Finberg*, 46 Tex. 35; *Steinbach v. Weil*, Tex. Court of Appeals (Civil Cases), § 936.

³ *Henry v. Voltz*, Tex. Court of Appeals (Civil Cases), § 775.

⁴ *McFaddin v. Crumpler*, 20 Tex. 374; *Brown v. Ector*, 19 Tex. 346; *Laird v. Thomas*, 22 Tex. 276; *Menard v. Sydnor*, 29 Tex. 257; *Stansbury v. Nichols*, 30 Tex. 145; *Searcy v. Mealler*, Tex. Court of Appeals (Civil Cases), § 929; *Tex. Pleading and Practice*, 19.

⁵ *Rosenbaum v. Harloe*, Tex. Court of Appeals (Civil Cases), § 850; *Harris v. Williams*, 44 Tex. 120.

⁶ *Miller v. Newton*, 23 Cal. 554; *Post*.

use of the family, or the husband; that these necessities could be furnished at the request of the husband; and that the husband could incur expenses for the benefit of the wife's separate property. The theory of these decisions was that the statutory estate of a married woman is subject to the same rules that apply to the equitable estate limited to the sole and separate use of a married woman, and that the husband had virtually the same powers over her estate under the statute as he formerly had in equity. This was afterwards overruled, the court holding that the statute was exclusive of all other rules, and that her estate could be changed only in a statutory way.¹

In *Milburn v. Walker*, *supra*, it was held that the purchase of supplies on behalf of the wife's separate property, and the incurring of expenses incident to its proper care, management, and preservation, are acts legitimately within the scope of the husband's duties as manager, and raise a just charge against the property. Subsequently, in *Stansbury v. Nichols*,² where a note was given by the husband for the payment of the purchase price of two mules that were purchased for and used on the farm of the wife and with her knowledge, the husband being insolvent, it was held that the complaint in the suit brought on said note against the husband and wife was bad in not alleging that the debt

¹ *Cartwright v. Hollis*, 5 Tex. 152; *Hollis v. Francois*, 5 Tex. 195; *Christmas v. Smith*, 10 Tex. 123; *Milburn v. Walker*, 11 Tex. 329; *Brown v. Ector*, 19 Tex. 346; *McFaddin v. Crumpler*, 20 Tex. 374; *Haynes v. Stovall*, 23 Tex. 625; *Ante*.

² *Stansbury v. Nichols*, 30 Tex. 145; *Searcy v. Mealler*, Tex. Court of Appeals (Civil Cases), § 929; *Kelley v. Embree*, Tex. Court of Appeals (Civil Cases), § 192; *Lee v. Crosby*, Tex. Court of Appeals (Civil Cases), § 140; *Eager v. Morris*, Tex. Court of Appeals (Civil Cases), § 177.

was contracted by the wife or on her authority, and the court expressed a doubt whether her estate could be made liable in any other mode than that pointed out by the statute.

In *Eager v. Morris*, the court laid down this rule: "The purchase of goods by the husband will not bind the wife, unless such purchase was authorized by her," and accordingly held that "expenses incurred by the husband in quarrying rock from land which was the separate property of the wife were (in that case) not expenses incurred for the benefit of her separate property, and for the payment of which she was bound."

In *Christmas v. Smith*,¹ it was held that the provision allowing execution on a judgment recovered for such debts to be levied upon the community property, or the wife's separate property, at the discretion of the plaintiff, was unconstitutional, as the separate property of the wife is liable only when there is no community property. This decision seems to have been overlooked in the later case of *Grant v. Whittlesey*,² where the statute was upheld in this regard, and the execution allowed to be levied upon the community property, or the wife's separate property, at the option of the plaintiff.

A married woman can not be a partner in business with any one, not even her husband, and the marriage of a woman in partnership with any one will dissolve the partnership. She can not, therefore, be held liable as a partner.³

¹ *Christmas v. Smith*, 10 Tex. 123.

² *Grant v. Whittlesey*, 42 Tex. 320.

³ *Wallace v. Finberg*, 46 Tex. 35; *Cookrum v. McCracken*, Tex. Court of Appeals (Civil Cases), § 65; *Steinbach v. Weil*, Tex. Court of Appeals (Civil Cases), § 934; *Brown v. Chancellor*, 61 Tex. 437.

§ 20. A married woman's right to make a contract respecting her separate property.—*California*.—(a) *Before the Code*.—Section 6 of the Act of April 17th, 1850, provided that no sale or other alienation of any part of the wife's separate property could be made, nor any lien or incumbrance thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband, before a notary public.

The provisions of section 6 did not apply to *money*. It did not contemplate that every time a married woman paid her money for articles purchased, she must execute an instrument in writing, in conjunction with her husband, to make a valid transfer of the money.¹

This Act of April 17th applied only to the separate property of women married subsequently to the passage of the Act, and to property acquired after the passage of the Act by women married before its passage, or married out of the State and residing and acquiring property in it thereafter. When separate property was acquired prior to its passage by a woman married prior to its passage, it was not governed by this Act of 1850.² Before this statute a wife could, under the Spanish or Mexican law, dispose of her separate property with the bare assent of her husband, as she chose, by any informal instrument, or, possibly, without writing.³

Under this statute a sale, alienation, or conveyance of the separate property of the wife, or any lien, or incumbrance, or charge thereon, was void, unless the same

¹ *Coles v. Soulsby*, 21 Cal. 51.

² *Stats.* 1850-3, p. 812; *Stats.* 1850, 254.

³ *Ingoldsby v. Juan*, 12 Cal. 576; *Bodley v. Ferguson*, 30 Cal. 517; *Racouillat v. Sansevain*, 32 Cal. 384.

was made by an instrument in writing, expressly referring to said separate estate, executed by the husband and wife, and acknowledged by her, as provided for in a conveyance of her real estate.¹ It was not necessary that the husband's name should appear in the body of the instrument. It was sufficient if he signed, sealed, and acknowledged it.²

A contract to convey her real estate was held to be binding upon a married woman, if executed in the mode prescribed by section 6 of the Act of 1850;³ and when a woman had, prior to her marriage, entered into a contract which was binding upon her, a specific performance might be decreed, notwithstanding her subsequent marriage.⁴ In *Miller v. Newton*,⁵ it was held that where a married woman, having separate estate, contracted debts with the intention of making those debts payable out of, and a charge on her separate estate (though not as above prescribed), a court of equity would decree the debts a charge on that separate estate, and direct it to be sold under the rules of the court, in such manner as might be equitable, and the proceeds to be applied in payment of the debts.⁶

The theory of this decision was that the statute did not in any way abrogate or impair the powers of a

¹ Hittell's General Laws, § 3568; *Poole v. Gerrard*, 6 Cal. 71; *Selover v. A. B. C. Co.*, 7 Cal. 266; *Kendall v. Miller*, 9 Cal. 591; *Ingoldsby v. Juan*, 12 Cal. 575; *Tryon v. Sutton*, 13 Cal. 490; *Morrison v. Wilson*, 13 Cal. 494; *DeLeon v. Higuera*, 15 Cal. 483; *Harrison v. Brown*, 16 Cal. 288; *Camden v. Vail*, 23 Cal. 633, S. C. 24 Cal. 397; *MacLay v. Love*, 25 Cal. 374; *Ewald v. Corbett*, 32 Cal. 493; *McLeran v. Benton*, 43 Cal. 472.

² *Dentzel v. Waldie*, 30 Cal. 138.

³ *Love v. Watkins*, 40 Cal. 562; *Gates v. Salmon*, 46 Cal. 374.

⁴ *Love v. Watkins*, 40 Cal. 562.

⁵ *Miller v. Newton*, 23 Cal. 554.

⁶ *MacLay v. Love*, 25 Cal. 374.

court of equity over the rights and property of a married woman. This was overruled in *Maclay v. Love*.¹

In this case the court said: "The rights of married women as to their separate property, and their power over it in California, do not depend alone upon the principles of the common law, or upon the doctrines of courts of equity, but mainly upon the Constitution and statutes of this State. . . . The wife, under our statute, can create no right against her separate property except in the mode prescribed. The prohibitory provisions of the Act would be of little avail if the wife, by simply contracting a debt to be paid out of her separate estate, could create a valid and binding charge upon it. But she has no such power, and an attempt to create a charge by her contract in the form alleged, would be simply void. Nor can a court of law or equity, in the face of the statute, create a right where none exists independent of its action."

The facts of this case were these, viz.: Harry and Mary Love, husband and wife, had executed their note as payment for surveying a tract of land belonging to the wife. Mary Love had also purchased some merchandise. There was no attempt to comply with the provisions of section 6 of the Act of 1850 in regard to the privy examination of the wife. It was held that there was no cause of action against her.²

The amendment of May 12th, 1862, to section 6,³ changed the rule as laid down in *Maclay v. Love* as regards the wife's *personal property*, and restored the doc-

¹ *Maclay v. Love*, 25 Cal. 367.

² *Brown v. Orr*, 29 Cal. 120; *Smith v. Greer*, 31 Cal. 478; *Belloe v. Davis*, 38 Cal. 242.

³ *Hittell's General Laws*, § 3568.

trine of *Miller v. Newton*. The provisions of section 6 were limited to *real property*, and this clause was added as to personal property: "The personal property of the wife shall not be sold, assigned, or transferred, unless both husband and wife join in the sale, assignment, or transfer thereof, except property which she is or may be authorized by law to sell, assign, or transfer as a *feme sole*." There is nothing here about any lien or incumbrance created on personal property. By this amendment the personal estate was taken out of the operation of the rule established in *Maclay v. Love*; a married woman might alone contract for services to be rendered for the protection and preservation of her separate estate, which was personal property, and for services thus rendered on the faith of her separate estate a court of equity would enforce a lien.¹

(b) *Under the Code*.—Section 158 of the Civil Code provides that either husband or wife may enter into any engagement or transaction with the other or with any other person, *respecting property which either might, if unmarried*, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the Title on Trusts.²

¹ *Terry v. Hammond*, 47 Cal. 32; *Friedberg v. Parker*, 50 Cal. 103.

² *Schuler v. Savings and Loan Society*, 1 West Coast Reporter, 125; *Cartan v. David*, 3 West Coast Reporter, 182. *Nevada*—Compiled Laws, 169. The facts of this case were as follows: The plaintiffs held an unsatisfied judgment against one of the defendants, Oliver Roberts, for \$800. They satisfied this judgment and also sold and transferred to Mrs. Roberts, his wife, certain saloon fixtures and supplies of the value of \$900, and in consideration therefor Roberts and his wife executed their joint promissory note for \$900. As collateral security for the payment of this note Mrs. Roberts endorsed and delivered to plaintiffs a note for \$5,000 secured by a mortgage upon certain real estate in Carson City, Nevada. This note and mortgage was her separate property. An action was commenced to foreclose said note and

Section 325 of the Civil Code provides as follows in regard to a married woman's stock transactions: "Shares of stock in corporations held or owned by a married woman may be transferred by her, her agent or attorney, without the signature of her husband, in the same manner as if such married woman were a *feme sole*. All dividends payable upon any shares of stock of a corporation held by a married woman may be paid to such married woman, her agent or attorney, in the same manner as if she were unmarried, and it is not necessary for her husband to join in a receipt therefor; and any proxy or power given by a married woman, touching any shares of stock of any corporation owned by her,

mortgage and to subject the proceeds to the satisfaction of said \$900 note. The Court held that the wife's contract came within the meaning of the statute (Compiled Laws, 169,) authorizing a married woman to enter into "any contract, engagement, or transaction respecting property," and said: "The question of the right and power of the wife to dispose of her separate estate, in any manner she pleases, is, and should be, left solely with her as a free agent. She has, under the provisions of the statute, the absolute and unlimited control over it. She can keep it, where the law places it, secure from her husband's debts, or she can, of her own free will, release it from the protection given by the law, and use it for the purpose of paying her husband's debts. She may, if she so pleases, give it to him to be squandered in any business or speculation in which he may engage, and if she does so without any fraud or undue influence, courts of equity will not relieve her from the obligations of her contract. Married women should remember that their legal position is different from what it was many years ago. Their property rights are no longer merged in the husband. With advancing civilization, the wisdom of legislative bodies has been gradually bestowing upon them greater privileges, and has virtually emancipated them from the slavery of the law as it existed ages ago. Our statute endows married women with all the faculties and rights of a human being. They should, therefore, keep constantly in mind, that with every enlargement of their rights there will necessarily come an increase of their responsibilities. Having asked, and been granted, the right to control their separate property, they must assume the risks which ordinarily follow. Having been given the right to make contracts respecting their separate estates, they should not complain if they are held liable to the same extent as other citizens."

is valid and binding without the signature of her husband, the same as if she were unmarried."

Section 1556 of the Civil Code provides that "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights." This is a very broad provision, and throws open the door to women, married as well as unmarried, to enter into contracts regarding property or otherwise.

A mortgage given by the wife on community property creates no lien, but is not void in the extreme sense. Under section 158 of the Civil Code (*supra*) she is as competent in law to execute a mortgage as though she were a *feme sole*; and while she may have no title to the mortgaged premises on which she could create a lien, it does not follow that the mortgage is void as a contract between the mortgagor and mortgagee. It stands on the same footing as a mortgage made by any other person on property to which he had at the time no title, and attaches to any subsequently acquired title. Upon the death of the husband a mortgage previously given by the wife on community property would attach to her interest in the community property.¹

When a married woman makes a contract with another person, which she is authorized by law to make, the legal presumption is that she contracted as principal. She possesses by law all the rights, and she is subject to all the duties of a contracting party. She has the absolute right to use and enjoy her separate property, and the rents, issues, and profits thereof, and to dispose of the same, by her own act and deed, without the consent of her husband.²

¹ Parry v. Kelley, 52 Cal. 334.

² Alexander v. Bouton, 55 Cal. 19.

The court in this last-mentioned case uses the following language: "A married woman unconnected with separate property of her own is, in this State, under disability to contract." This statement is not borne out by the statute, or the decisions of the same court. A married woman is not under disability to contract if she has no separate property, any more than is a man who has no property, separate or common. Her contract is good as a contract. As was said in the case of *Parry v. Kelley*, *supra*, when a married woman had given a mortgage on community property, "it stands on the same footing as a mortgage made by *any other person* on property to which he had, at the time, no title."

Texas.—There is in Texas no statute as comprehensive as the one in California. And yet, with the exception that her husband must join her in disposing of her property, a married woman has substantially the same power of disposition. She has the unlimited power, *with the joinder of her husband, and in the mode prescribed*, for any consideration, valuable or good, to convey her separate property. She can sell it, and give the purchase money to a profligate husband, or pay his debts, or make any other disposition of it she chooses. She may donate it by deed of gift to a worthy relative or a public charity. Her power of conveyance, in the mode prescribed, is unlimited. She can mortgage her separate estate to secure the payment of a debt created by the husband before the expiration of the mortgage.¹ It has been held that, if the wife mortgages her separate property for the sole benefit of her husband, after his death she will stand in the place of the mortgagee, and

¹ *Wiley v. Prince*, 21 Tex. 639; *Jordan v. Peak*, 38 Tex. 429; *Rhodes v. Gibbs*, 39 Tex. 442, 446; *Shelby v. Burtis*, 18 Tex. 644.

can compel the debts to be satisfied first out of the assets of the husband's estate.¹ She can, when joined by her husband, without consideration moving to her own benefit, secure the debt of a third party, by deed of trust upon her separate property, duly made and acknowledged in the form prescribed by statute for the conveyance of such property.² She must, however, join with him, as her separate property can not be legally passed from her except in the mode pointed out by the statute.³ The only exception to this rule is, when she contracts for necessities for herself or children, or incurs expenses for the benefit of her separate estate.⁴ In *Taylor v. Hall*,⁵ it was held that the title of a married woman to property was not divested by a wager made by herself and her husband, even though she delivered the property in payment of the wager. The above rule applies to all kinds of property. "The Constitution makes no distinction between real and personal property, and the Act defining the mode of conveying property, in which the wife has an interest, embraces all property."⁶

§ 21. Conveyances by a married woman.—*California*.—

(a) *Before the Code*.—The Act concerning conveyances was passed April 16th, 1850, the day previous to the passage of the Act "defining the rights of husband and wife."⁷

¹ *Hollis v. Francois*, 5 Tex. 203; *Baily v. Trammell*, 27 Tex. 325.

² *Hall v. Dotson*, 55 Tex. 521.

³ *Berry v. Donley*, 26 Tex. 739; *Reagan v. Holliman*, 34 Tex. 404; *Tucker v. Carr*, 39 Tex. 101; *Hampshire v. Floyd*, 39 Tex. 105; *Fitzgerald v. Turner*, 43 Tex. 84.

⁴ *Ante*, § 19.

⁵ *Taylor v. Hall*, 20 Tex. 211.

⁶ *Hollis v. Francois*, 5 Tex. 201; *Tucker v. Carr*, 39 Tex. 100.

⁷ *Stats.* 1855, p. 12.

Section 2 authorized the real estate of the wife to be conveyed by the joint deed of the husband and wife.

Section 19 provided that such a conveyance should be executed and acknowledged by the husband and wife, and certified as prescribed by law.

Section 20 provided that no covenant, expressed or implied, in any such conveyance, should bind such married woman or her heirs, except so far as might be necessary effectually to convey from such married woman and her heirs, all her rights and interest expressed to be conveyed in such conveyance. By an amendment of Feb. 14, 1855,¹ a married woman could convey and transfer her lands as if she were single, if her husband was not and had not been for one year next preceding a resident of the State, the execution of the conveyance being acknowledged before the District Judge of the county in which the land was situated, and the certificate reciting the fact that the husband's said absence had been proved by two credible witnesses.² In 1870³ an Act was passed giving the wife, while living separate and apart from her husband, the sole and exclusive control of her separate property, the right to sue and be sued alone, to avail herself of, and be subject to all legal process in all actions, and to sell her real estate, without joining with her husband, upon recording in the county where the real estate was situated a declaration as provided by said Act.

If she was abandoned before she came to this State, and the husband had never been in this State, she could contract as a *feme sole*,⁴ but the fact that the husband

¹ Hittell's General Laws, §§ 697, 698.

² Harrison v. Brown, 16 Cal. 290; Salmon v. Wilson, 41 Cal. 595.

³ Hittell's General Laws, § 8834-37; Tobin v. Galvin, 49 Cal. 34.

⁴ Blumenberg v. Adams, 49 Cal. 308.

abandoned his wife, or suffered her to act as a *feme sole*, and take care of herself, did not give her a right to mortgage her separate property, whatever might be the effect of such acts of the husband in rendering her personally liable for her contracts.¹

(b) *Under the Code*.—Section 162 of the Civil Code provides that the wife may, without the consent of the husband, convey her separate property.²

Texas.—The law did not at first point out any mode for the exercise of the wife's power of disposition of her property. Her power was uncontrolled.³ Subsequently, in 1846, the following statute was passed: "When a husband and wife have signed and sealed any deed or other writing, purporting to be a conveyance of any estate or interest in any land, slave or slaves, or other effects, the separate property of the wife, appear before any judge of the Supreme or District Court, or notary public," and shall separately acknowledge the same as provided by law, thereupon such judge or notary shall certify such privy examination, acknowledgment, and declaration, under his hand and seal, by a certificate annexed to said writing.⁴

The Revised Statutes provide as follows: "The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been

¹ *Harrison v. Brown*, 16 Cal. 288; *Lawrence v. Spear*, 17 Cal. 421.

² *Nevada*.—"The wife may, without the consent of her husband, convey, charge, encumber, or otherwise in any manner dispose of her separate property." Compiled Laws, 159; *Rickards v. Hutchinson*, 1 West Coast Reporter, 661. Formerly it was necessary for the husband to join her in all instruments affecting her real property. Compiled Laws, 248; *Beckman v. Stanley*, 8 Nev. 257.

³ *Cartwright v. Hollis*, 5 Tex. 152.

⁴ *Pasch. Dig.* 1003.

acknowledged by her privily and apart from her husband, before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded and certified to."

If the husband abandon the wife and leave her to take care of herself and her property, his assent is not necessary to her disposition of her property.¹

§ 22. Acknowledgment and Certificate.—*California*.—(a) *Before the Code*.—Conveyances of real estate by other than married women, as between the parties, are valid and pass the title without being acknowledged or recorded. Such conveyances, if acknowledged as required by law, are admissible in evidence without further proof, but if not so acknowledged, they must be proved according to the ordinary rules of law applicable to the subject.

Conveyances required to be executed by married women are not valid, nor do they pass any title, nor can they be used in evidence unless acknowledged in the manner prescribed by law.²

Section 19 of the Act of 1850 provided that the deed of a woman should be executed, acknowledged, and certified. Section 22 provided that no such acknowledgment should be taken, unless such married woman should be personally known to the officer to be the person whose name was subscribed to the instrument as a party thereto, or proved to be such by a credible witness, nor unless such married woman *should be made acquainted* with the contents of such conveyance, and should acknowledge on an examination, apart from and without

¹ Rev. Stats. 559; *Walker v. Stringfellow*, 30 Tex. 570; *Ante*.

² *Mott v. Smith*, 16 Cal. 536; *Landers v. Bolton*, 26 Cal. 394; *Ewald v. Corbett*, 32 Cal. 493.

the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she did not wish to retract the execution of the same. Section 23 provided that the certificate of the officer taking her acknowledgment should set forth these facts. The statute did not require that the notary himself should make her acquainted with the contents of the instrument, but only that she should be made acquainted. The words "by me" in the portion of the notarial certificate "having been by me first made acquainted with the contents"¹ were therefore held to be surplusage.

(b) *Under the Code.*—Section 1093 of the Civil Code provides that no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by sections 1186 and 1191.

Section 1186 of the Civil Code provides that the acknowledgment of a married woman to an instrument purporting to be executed by her, must not be taken unless she is made acquainted *by the officer* with the contents of the instrument on examination without the hearing of her husband; nor certified unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution.

This acknowledgment differs from the one required before the Code in this particular, viz.: She must, under the Code, be made acquainted with the contents of the

¹ *Jansen v. McCahill*, 22 Cal. 563; *French Bank v. Beard*, 54 Cal. 480.

instrument *by the officer*, whereas the Act of 1850 required simply that she should be made acquainted.¹

A certificate that does not state that the notary, upon an examination without the hearing of her husband, made her acquainted with the contents of the instrument, is defective.²

Section 1191 of the Civil Code provides that the certificate shall be substantially in this form, viz.:

“ STATE OF }
COUNTY OF } ss.

“ On this the.....day of....., in the year....., before me, *John Doe*, a, personally appeared *Jane Roe*, known to me (or proved to me on the oath of *Richard Hoe*) to be the person whose name is subscribed to the within instrument, described as a married woman, and upon an examination without the hearing of her husband I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.”

Section 1187 of the Civil Code provides that a conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner, except as mentioned in the last section; *but such conveyance has no validity until so acknowledged.*

In the case of a married woman, the acknowledgment is a part of the execution of the instrument. Until *acknowledged* it is not executed, but when *executed*, it is acknowledged; for when it is said that an instrument is “*executed*,” every act is imparted which is requisite to make it operative and effective. It is there-

¹ *Nevada*—Compiled Laws, 182, 183, 184.

² *Hutchinson v. Ainsworth*, 63 Cal. 286.

fore not necessary, in a suit on such an instrument, to allege that it was acknowledged.¹ This was the doctrine of *Landers v. Bolton*, 26 Cal. 394, decided before the Code.

Defective acknowledgment and certificate.—California.—(a) *Before the Code.*—A married woman could make no contract to bind herself except in the mode prescribed by the statute. The provisions of the statute she must strictly pursue. Her deed, if not properly acknowledged, could not be corrected; it was void.²

No presumption of knowledge, on the part of a married woman, of the contents of a deed, arose from the fact of executing it.³

In 1860⁴ the legislature passed an Act, giving to the county judge jurisdiction to correct any defective acknowledgments to deeds or instruments in writing affecting the title to any real estate in his county, which had been executed by husband and wife, or any other person of lawful age. Upon proof of service, according to the statute, upon the parties to such an instrument, of a verified petition for the correction of a defective certification of the acknowledgment of the instrument, and upon satisfactory proof that the instrument had been, in fact, acknowledged according to law, before an officer qualified by law to take it, who had made a defective return of it, the county judge was authorized to order the certificate to be amended; and such an order, when endorsed upon or annexed to

¹ *Joseph v. Dougherty*, 60 Cal. 358; *Durfee v. Garvey*, 3 West Coast Reporter, 356.

² *Barrett v. Tewksbury*, 9 Cal. 15; *Kendall v. Miller*, 9 Cal. 591; *Pease v. Barbiers*, 10 Cal. 441; *McLean v. Benton*, 43 Cal. 467.

³ *Pease v. Barbiers*, 10 Cal. 441.

⁴ *Hittell's General Laws*, §§ 707, 708.

the instrument, entitled it to be recorded, and to be valid as if originally correctly certified.¹

(b) *Under the Code*.—Section 1202 of the Civil Code provides that when the acknowledgment or proof of the execution of an instrument is properly made but defectively certified, any party interested may have an action in the District (Superior?) Court to obtain a judgment correcting the certificate. But this refers only to certificates made subsequent to the Code.²

In *Leonis v. Lazzarovich*,³ the Supreme Court said: "The certificate is absolutely essential to the deed, and is a material part thereof. . . . If the certificate of acknowledgment is insufficient, the conveyance is absolutely void." This statement the same court subsequently held to be superfluous, as the object of that action was "to correct an alleged mistake in the deed of a married woman. The deed had been duly executed, acknowledged, and certified, and the court held, that it could not be reformed by adding to it any other property than what was described in it, because a married woman cannot be divested of her real estate, except in the mode prescribed by the Codes."⁴

In this case of *Wedel v. Herman*, the main question was, whether a defective *certificate* of acknowledgment to the deed of a married woman, purporting to transfer her separate real property, can be reformed in a court of equity? The Act "concerning conveyances," passed April 16, 1860,⁵ provided that a married woman might convey any of her real estate by any conveyance

¹ *Wedel v. Herman*, 59 Cal. 507.

² *Judson v. Porter*, 53 Cal. 482.

³ *Leonis v. Lazzarovich*, 55 Cal. 56, 59.

⁴ *Wedel v. Herman*, 59 Cal. 514.

⁵ *Ante.*

thereof, executed and acknowledged by herself and her husband, *and* certified, etc. (Section 19.) In 1860, as we have seen,¹ the legislature passed an Act enabling the County Court to correct a defective *certificate*. The courts had held, under this statute, that any instrument defectively acknowledged *and* certified was void and could not be corrected.

Under the Code, execution, acknowledgment, *and* certification are no longer necessary. Section 1093, Civil Code, provides simply that no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is *acknowledged*, etc., etc. Section 1187 provides simply that no such conveyance has any validity until so *acknowledged*. When executed and acknowledged, her conveyance has the same legal effect as the deed of a *feme sole*. Therefore the *certificate* of acknowledgment is *not* an essential part of the conveyance. Her deed, executed and acknowledged according to law, is valid though *defectively certified*. This error can be corrected by the Superior Court.² The certificate in *Wedel v. Herman* was defective in that it omitted to state "that upon an examination without the hearing of her husband he had made her acquainted with the contents of the conveyance." This the court held could be corrected.

In an action to foreclose a mortgage, the admission in evidence of a mortgage executed by a married woman was denied because of a defective certificate of acknowledgment. It was held that the complaint could be amended so as to admit proof that the mortgage had

¹ *Ante*.

² *Wedel v. Herman*, 59 Cal. 513; *Hutchinson v. Ainsworth*, 63 Cal. 286.

been in fact properly acknowledged, and thus the necessity of a separate action to correct the certificate be avoided.¹

A defective *acknowledgment* can not be corrected. It could not be corrected under the Act of 1860, that Act requiring proof that the instrument had been, *in fact*, acknowledged according to law. It can not be corrected under the Code.² But when the acknowledgment is properly *made* but defectively *certified*, the *certificate* may be corrected. The acknowledgment is part of a married woman's deed, and her *deed* can not be corrected. A married woman attempted to convey certain real property by her deed, acknowledged and certified as the deed of a *feme sole*. Subsequently she conveyed the same property to another person by a deed properly acknowledged. It was held that the grantee under the first deed took nothing, and that a re-acknowledgment of the first deed, properly certified, made *after* the second conveyance, could not cure said defective acknowledgment. In this case the court received evidence as to the facts of the acknowledgment.³

In acknowledgments, substantial conformity with the statute is sufficient.⁴

Texas.—Acknowledgment and Certificate.—The Act of 1846 provided that the wife should be privily examined by the officer, apart from her husband, that she should declare that she did freely and willingly sign and seal the said writing, then shown and explained to her; that she did not wish to retract it, and that she acknowl-

¹ *Hutchinson v. Ainsworth, supra.*

² Civil Code, § 1202.

³ *Durfee v. Garvey*, 3 West Coast Reporter, 356.

⁴ Civil Code, § 1202; *Goode v. Smith*, 13 Cal. 81; *Muir v. Galloway*, 61 Cal. 498.

edged the said deed or writing so again shown to her as her act.

This Act further provided that the judge or notary should certify such privy examination, acknowledgment, or declaration, under his hand and seal, by a certificate annexed to said writing, to the following *effect or substance*, viz.:

"State of Texas, County of....., Before me.....
....., Judge of, (or Notary Public of).....county,
personally appeared....., wife of.....,
parties to a certain deed or writing bearing date on the
.....day of....., and hereto annexed, and having been
examined *by me* privily and apart from her husband,
and having the same fully explained to her, she, the said
....., acknowledged the same to be her act and deed,
and declared that she had willingly signed, sealed, and
delivered the same, and that she wished not to retract
it; to certify which I hereto sign my name and affix my
seal, this.....day of....., A. D....."

The Act also provided that such deed or conveyance, so *certified*, should pass all the right, title, and interest which the husband and wife, or either of them, might have in or to the property therein conveyed.¹

In *Womack v. Womack*,² the court said that this "Statute of 1846, which provides the mode of conveying the wife's property, does not expressly declare absolutely void any other mode of conveyance." In this and in *Gregory v. Van Vleck*,³ there were apparent deviations from the rule laid down by the statute.

The Revised Statutes provide as follows: "No ac-

¹ Pasch. Dig., Art. 1003.

² *Womack v. Womack*, 8 Tex. 397.

³ *Gregory v. Van Vleck*, 21 Tex. 40.

knowledge of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken unless she has had the same shown to her, and then and there fully explained to her by the officer taking the acknowledgment, on an examination privily and apart from her husband ; nor shall he certify to the same unless she thereupon acknowledges to such officer that the same is her act, that she has willingly signed the same, and that she wishes not to retract it.”¹

The certificate of acknowledgment of a married woman must be substantially in the following form :

“The State of Texas, }
 County of..... } Before me,.....
 on this day, personally appeared.....the wife
 of.....known to me (or proved to me on the
 oath of.....) to be the person whose name is sub-
 scribed to the foregoing instrument, and having been
 examined by me privily and apart from her husband,
 and having the same fully explained to her, she, the
 said....., acknowledged such instrument to be her
 act and deed, and declared that she had willingly signed
 the same for the purposes and consideration therein ex-
 pressed, and that she did not wish to retract it.

SEAL.

Given under my hand and seal of office,
 this.....day of.....”²

A married woman’s deed is *not* complete without the certificate of her separate acknowledgment as prescribed by law. Its absence can not be supplied by parol evidence.³ The statute requires a privy examination,

¹ Rev. Stats. 4310.

² Rev. Stats. 4313.

³ *Looney v. Adamson*, 48 Tex. 619.

separate acknowledgment, and declaration. These are the essence of the deed, and without them it is mere waste paper. The wife's signature is a nullity without the privy examination, as it is the examination and not the signature that gives validity to the deed.¹ The certificate must show that she willingly signed the deed,² that she was privily examined by the officer taking the acknowledgment,³ and that the instrument was explained to her by this officer; that *thereafter* she acknowledged it to be her act, and declared that she did not wish to retract it.⁴

The notarial seal is necessary to show this privy examination and acknowledgment.⁵

There need not be a *literal* compliance with the statute by the officer in his certificate. A substantial compliance is sufficient. The general rule upon this subject is, that there must be a substantial, though not a literal, compliance with the terms of the statute, and that, though words not in the statute can be used in the place of others that are, or words in the statute are omitted, yet, if the meaning of the words used is the same, or they represent the same fact, or, if the omission of a word or words is immaterial, or can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be held sufficient.⁶

¹ Callahan v. Patterson, 4 Tex. 61; Nichols v. Gordon, 25 Tex. (Sup.) 109; Berry v. Donley, 26 Tex. 737; Cross v. Everts, 28 Tex. 524; Young v. Van Benthuyssen, 30 Tex. 762; Hampshire v. Floyd, 39 Tex. 103; Fitzgerald v. Turner, 43 Tex. 79.

² Smith v. Elliott, 39 Tex. 201.

³ Rice v. Peacock, 37 Tex. 392.

⁴ Ruleman v. Pritchett, 56 Tex. 485.

⁵ McKellar v. Peck, 39 Tex. 381.

⁶ Belcher v. Weaver, 46 Tex. 298; Solyer v. Romanet, 52 Tex. 567; Mullins v. Weaver, 57 Tex. 6; Coombes v. Thomas, 57 Tex. 322.

The following certificate was held defective: "And the said Mary Ruleman having also appeared before me privately and apart from her said husband, and acknowledged the execution of the said power of attorney to have been done by her freely, understandingly, and without compulsion or constraint from her said husband, and for the purposes therein contained."¹

This was held defective because it nowhere appeared in the certificate that the instrument was explained to her by the officer, and that *thereafter* she acknowledged it to be her act, and declared that she wished not to retract it. The law requires that the certificate must show that the instrument was explained to her by him, and that *thereupon* she declared her *present* wishes, by acknowledging it as her act and stating that she wished not to retract it.

The following certificate was held defective: "Acknowledged to me that they executed the same, and said Carmalita Cheron, in private examination, separate and apart from her said husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband; the parties before signing declared that they could not write their names, made their mark, etc. In testimony whereof, etc."

This was especially defective in not showing that the instrument was sufficiently explained to the wife *by* the officer taking the acknowledgment, and that she was asked whether she desired to retract the deed.²

The following certificate was held defective: "Being examined by me privily and apart from her husband (David Langton aforesaid), declared *that she fully un-*

¹ *Buleman v. Pritchett*, 56 Tex. 485.

² *Burkett v. Scarborough*, 59 Tex. 497.

derstood the contents of said deed, and that she signed it freely, and without fear of her husband, and did not wish to retract it."

This was held insufficient in not showing that the instrument was "*fully explained to her by the officer taking the acknowledgment*," the court saying: "By the statute the duty is imposed upon the officers to fully explain to the married woman the instrument which she is thus called upon to acknowledge. This contemplates that the officer will act in the matter as her adviser, and so explain to her the instrument that she may comprehend its true import and meaning. It will not do to hold that, because she may state to him that she understands the purport of the writing, he may dispense with the explanation contemplated by the statute, as it might be that her information about the instrument was derived from the husband, and that she might be wholly relying upon whatever construction he might impose upon her, and in this way the very object of the privy examination would be defeated. For, while she might well declare to the officer that she acted freely and willingly in the matter, and was not induced to do so by compulsion, still the fact remains that she was induced to do so on account of the statements made to her by the husband as to the purport of the instrument and the effect it was to have upon her rights."¹

The deed of a married woman, nothing appearing on its face to show that the grantor is a married woman, if acknowledged simply as the deed of an unmarried woman, is *presumptively* valid. The fact that the

¹ Langton v. Marshall, 59 Tex. 297.

grantor is a married woman must be alleged and proved.¹

Defective Certificates.—*Texas.*—The Revised Statutes provide as follows: "When the acknowledgment or proof of the execution of any instrument in writing may be properly made, but *defectively certified*, any party interested may have an action in the District Court to obtain a judgment correcting the certificate."² This is a general provision, and seems to include *femes covert* as well as *femes sole*.

§ 23. Duress.—*California.*—If the wife executes a mortgage under the compulsion or undue influence of her husband, without any knowledge of such compulsion on the part of the mortgagee, she can not avoid the mortgage, unless, also, *at the time of the acknowledgment*, she acted under this compulsion or undue influence.³ Such duress, however, only renders the mortgage voidable, not void, and then not as against an innocent purchaser for value and without notice of the duress.⁴

Texas.—It is essential for the security of titles that this certificate should be held conclusive, as it is the *acknowledgment* and not the *signature*, that passes the title in a conveyance by a married woman.⁵

It may be rebutted, however, by proof of fraud, mistake, or imposition. The wife can not impeach for fraud the certificate of acknowledgment to a deed of her's when the same is in conformity to the require-

¹ Fry v. Baker, 59 Tex. 404.

² Rev. Stats. 4353.

³ Joseph v. Dougherty, 60 Cal. 358; Durfee v. Garvey, 3 West Coast Reporter, 356.

⁴ Connecticut Life Ins. Co. v. McCormick, 45 Cal. 580.

⁵ Waltee v. Weaver, 57 Tex. 571.

ments of the statutes, and when there is an adequate consideration paid to support the deed, if the purchaser neither participated in the fraud nor had knowledge of its existence. In a case where a consideration has passed to the wife, it must be alleged and proved that the fraud was known to the grantee. It is doubtful whether this knowledge must be brought home to the grantee when no consideration has passed to the wife.¹ In a very recent case the court in ruling upon this question of fraud said: "The ignorance as to the character of the instrument, or the fraud which brought about its execution, must concur with notice either actual or constructive on the part of the grantee, in order to avoid the deed, if it is properly certified to by the officer taking the separate acknowledgment."²

In *Wiley v. Prince*, threats by the husband to burn down the house and carry away the children were held sufficient duress to avoid the conveyance by the wife. In *Kocourek v. Marak* threats by the husband to leave and abandon the wife were held sufficient to avoid her deed.

In *Waltee v. Weaver* it was held that a married woman must aver and prove that any deceit practiced on her by her husband was known to the purchasers, and that she can not be heard to say that she did not understand the effect of the deed, nor the explanation thereof by the officer who made the privy examination, in the absence of fraud and duress.

In *Davis v. Kennedy*³ it was held erroneous to charge

¹ *Hartley v. Frosh*, 6 Tex. 216; *Shelby v. Burtis*, 18 Tex. 644; *Pool v. Chase*, 46 Tex. 207; *Wiley v. Prince*, 21 Tex. 637; *Williams v. Pouns*, 48 Tex. 146; *Waltee v. Weaver*, 57 Tex. 571; *Kocourek v. Marak*, 54 Tex. 205.

² *Ragland v. Wisrock*, 61 Tex. 394.

³ *Davis v. Kennedy*, 58 Tex. 519.

the jury that, although the certificate was to the effect that the married woman making the conveyance acknowledged it in the manner and under circumstances as required by law, she might establish by extraneous proof that such certificate did not speak the truth; that she could not do this, and thus defeat the right of a party, who, innocent of all knowledge of such facts, and with a deed presented to him bearing her signature and the proper certificate, has paid his money or parted with his property on the faith of its conformity to truth.

The same strictness as to what would constitute legal duress on the part of the husband does not apply against the wife by reason of their peculiar relationship.¹

§ 24. A married woman's right to execute a power of attorney.—*California*.—(a) *Before the Code*.—By an Act of April 13, 1863,² a married woman was authorized to make and execute a power of attorney for the sale, conveyance, or incumbrance of her real or personal estate, provided her husband joined in the execution and the same was acknowledged and certified as prescribed for a conveyance of real estate. She could revoke this power of attorney without her husband joining, but not without the acknowledgment and certificate required in her conveyances of real estate.

Prior to the passage of this law a married woman could not sell and convey her separate estate by an attorney-in-fact, but could do it only *in propria persona*.³ Powers of attorney executed prior to the passage of this

¹ *Kocourek v. Marak*, 54 Tex. 205.

² *Hittell's General Laws*, §§ 715 to 718.

³ *Mott v. Smith*, 16 Cal. 536; *Dentzel v. Waldie*, 30 Cal. 139; *Dow v. Gould & Curry*, 31 Cal. 630; *Heinlen v. Martin*, 53 Cal. 321.

Act were validated, if the husband had joined in their execution.

The husband could not appoint an agent to give his consent, as required, in dealings concerning his wife's separate property, as the object of the law was to give the wife the protection of his *personal* advice and judgment.¹ A joint power of attorney signed by both husband and wife was effective, however, and the attorney-in-fact could execute a lease or deed as the act of the wife, as if she were unmarried.²

(b) *Under the Code.*—Under the Code a married woman may execute a power of attorney. She must, however, acknowledge it in the mode prescribed for her conveyances, when the power of attorney authorizes the execution of an instrument transferring an estate in her separate real property.³

Texas.—A married woman can, jointly with her husband, dispose of her separate property by an attorney-in-fact duly appointed by a power of attorney, executed and acknowledged in the manner prescribed by law for the execution and acknowledgment of her deeds of conveyance.⁴ A power of attorney, although clearly assented to by the husband, will be ineffectual if made by the wife alone.⁵ In *Cannon v. Boutwell*, the husband conveyed the separate property of his wife under a power of attorney executed by her alone. The court held the conveyance invalid by reason of said power of attorney, and said: "The statute does not attempt to

¹ *Meagher v. Thompson*, 49 Cal. 191; *Green v. Smith*, 49 Cal. 280.

² *Douglas v. Fulda*, 50 Cal. 77.

³ Civil Code, § 1094; *Reis v. Lawrence*, 63 Cal. 129; *Nevada*—Compiled Laws, § 183.

⁴ *Patton v. King*, 26 Tex. 685; *Reagan v. Holliman*, 34 Tex. 404.

⁵ *Cannon v. Boutwell*, 53 Tex. 627.

provide for either conveyances or powers of attorney from the wife to the husband, and we think it would be a deviation from the policy of the law, wholly unauthorized by anything in the statute, to allow the husband, by means simply of a general power of attorney from the wife, to dispose of her separate estate at his will."

§ 25. Disability of infancy.—*California*.—Prior to 1858 the disability of infancy attached to married as well as to unmarried female minors. The age of majority for females was eighteen years. By a statute enacted in 1858 a married woman, under eighteen years of age, was deemed of full age if she was married with the consent of her parents or guardian.¹

Under the Code the age of majority for females is eighteen years, but an unmarried female of the age of fifteen years is capable of consenting to and consummating marriage.² The Code requires that, if a female is under the age of eighteen years, she must obtain the consent of her father, mother, guardian, or one having the charge of her to her marriage,³ and that a marriage is null if it is consummated without such consent by a female "*under the age of legal consent*."⁴

Query.—Does this "*age of legal consent*" refer to the age of *fifteen* years as the age when a female is "*capable of consenting to and consummating marriage*," or to the age of eighteen years under which such consent must be obtained? (The Supreme Court of Nevada seems to have settled this in favor of the for-

¹ *Magee v. Welsh*, 18 Cal. 159.

² Civil Code, §§ 25, 56.

³ Civil Code, §§ 68, 69.

⁴ Civil Code, § 82.

mer theory, holding that "the age fixed by statute as the age of consent renders parties of such age no longer *infants* with regard to that special contract.)¹

Under the Code there seems to be some doubt as to the effect of marriage upon the legal infancy of a female. Section 241, Civil Code, as first enacted, provided that the guardian of the *person* of a child born, or likely to be born, could be appointed by the will or deed of a parent. It now provides that the guardian of the *person or estate* of a child born or likely to be born may be appointed by the will or deed of a parent, and Section 254, Civil Code, provides that such a guardianship is terminated by the solemnized marriage of the ward.

It would seem from these sections that the guardianship of the person and of the estate, where the guardian has been appointed by the parent, ceases upon the *solemnized* marriage of the ward. If, however, the guardian is appointed by the court, the guardianship of the *person* only is terminated by the solemnized marriage of the ward, as section 255, Civil Code, provides that "the power of a guardian appointed by a *court* is suspended only: (1) by order of the court; or, (2) if the appointment was made solely because of the ward's minority, by his attaining majority;² or, (3) *the guardianship over the person of the ward, by the marriage of the ward.*"

¹ *Nevada*.—A female marrying under the age of eighteen years must obtain the consent of her parents or guardian, and yet the lawful age of females is sixteen years. (Stats. 1867, p. 88.) In *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63, the Supreme Court held that a marriage of a female under eighteen years of age, but not under sixteen years of age, was valid and binding, though made without the consent of her parents or guardian.

² *In re Guardianship of Allgier*, 2 West Coast Reporter, 877.

Of course the infant can not make a contract or incur an obligation that will affect the estate of the infant until the guardianship over the estate is terminated.

Texas.—The Revised Statutes provide as follows :
“Every female under the age of twenty-one years, who shall marry in accordance with the laws of this State, shall, from and after the time of such marriage, be deemed to be of full age, and shall have all the rights and privileges to which she would have been entitled had she been at the time of her marriage of full age.”¹

A minor is a male or female under twenty-one years of age who has never been married.² The earliest age at which a female minor can contract marriage is fourteen and a male minor sixteen.³ The consent of the parents or guardians is necessary, unless the male is twenty-one years of age and the female eighteen years of age.⁴ The law requires persons desirous of marrying to obtain a license from the clerk of the County Court, and forbids him from issuing such license, without the consent of the parents or guardians, if the male party is under twenty-one years of age and the female is under eighteen years of age.⁵ There is no provision declaring a marriage null and void that is contracted without such consent. The only provision in this regard is the following : “Males under sixteen and females under fourteen years of age shall not marry.”⁶

¹ Rev. Stats. 2858; Pasch. Dig. 4642.

² Rev. Stats. 2471.

³ Rev. Stats. 2839; Pasch. Dig. 7119.

⁴ Rev. Stats. 2841; Pasch. Dig. 4667.

⁵ Rev. Stats. 2840, 2841; Pasch. Dig. 4666, 4667.

⁶ Rev. Stats. 2839.

§ 26. Estoppel in Pais.—*California*.—(a) *Before the Code*.—The doctrine of *estoppel in pais* had no application to the estate of married women. The Act of 1850 (*ante*) was an enabling Act, and enabled a married woman to convey only in the mode therein prescribed. While it is true that fraud vitiates all contracts, yet, in cases of married women, under statutes like the above this doctrine was limited to this—that a contract so infected could not be enforced ; but not that a fraudulent representation would divest a *feme's* title in the face of a statute declaring a different and exclusive mode of divestiture.¹

In *Harrison v. Brown*,² where the husband abandoned the wife and left her to take care of herself, and she mortgaged her separate real property by her act alone, the court held that the wife was not estopped from having the mortgage canceled because of the want of the husband's execution thereof, and said : " The fact of the abandonment of the wife by the husband, or his suffering her to act as a *feme sole*, as stated in the bill, if such were the facts—whatever the effect of this may have been to render her personally liable for her contracts—neither gave her a right to bind *his* real property, or her own by mortgage."

In *Lawrence v. Spear*³ the court apparently held contrary to *Harrison v. Brown*. The facts of the case were these : The husband had abandoned his wife and left her to labor for her own support. She kept a boarding-house, bought and paid for furniture, etc., with the knowledge of her husband, who always said that

¹ *Morrison v. Wilson*, 13 Cal. 498.

² *Harrison v. Brown*, 16 Cal. 290.

³ *Lawrence v. Spear*, 17 Cal. 421; *Blumenberg v. Adams*, 49 Cal. 308.

she could do whatever she pleased. She sold some of this furniture, and *he* subsequently attempted to annul this sale by the wife and to sell it to another person. The court held that he must be held to have assented to her disposition of the furniture. This was an estoppel against the husband, he alone attempting to set aside her transfer. It was a transfer of *personal property*, and, also, a *hard case*, and the ruling of the court was, on these grounds, justifiable.

(b) *Under the Code*.—At common law and in California before the Codes the doctrine of estoppel *in pais* did not apply to a married woman. It would seem that this rule has been somewhat relaxed under the Code.

In *Reis v. Lawrence*¹ the Supreme Court held that a married woman was estopped, under the following state of facts: Fannie P. Lawrence was separated from her husband, Hiram Hutchinson, in March, 1872, and in July, 1873, she obtained in Utah a divorce, which our courts treated as invalid. On the 26th of May, 1874, she executed to her father a power of attorney, and signed it "Fannie P. Lawrence, formerly Fannie L. Hutchinson." Subsequently her father executed a deed under this power of attorney, and she also executed to the grantee an additional deed of the same property. The certificate in neither case was that required in the case of a married woman, and in the one attached to the deed she was described as "Fannie P. Lawrence (*feme sole*)."¹ At the time when the deed was executed under the power of attorney, the attorney-in-fact represented to the grantee that his principal had obtained a divorce from her husband and was restored to her maiden name. She subsequently attempted to avoid

¹ *Reis v. Lawrence*, 63 Cal. 129.

the effect of these conveyances upon the plea that she was all along a married woman and that the certificates did not conform to the statute. The court held that she was estopped. The facts of this case appeal very strongly to one's sense of justice in favor of this ruling of the court; but hard cases make bad precedents, and, unless supported by the reasons that govern other cases, should not be followed.

The Code has changed the law regarding conveyances and contracts of married women, has relieved her property from the control of her husband, has empowered her to make any contract that he can make, to dispose of and encumber her property in any way in which the same can be done by him with his own property, and to do this by her own single act, unhampered by the necessity of having him join with her in such acts. It is true that *she must acknowledge* her conveyances as prescribed by law,¹ whereas *his* conveyances are valid without an acknowledgment. It is also true, however, that the title to lands shall pass *only* by an instrument in writing, signed by the parties to be charged,² and yet, in the case of a man or of a single woman, this does not prevent the operation of an estoppel *in pais without deed duly signed*. Why should not then the doctrine of *estoppel in pais* apply to a married woman, between whom and a man or single woman there is no longer any difference in property rights other than the one in regard to acknowledgments? The answer is found in this one point of difference. The provision of the Code requiring conveyances of real property to be in writing duly signed, was intended as much for the protection

¹ *Ante*.

² Civil Code, § 1091.

of the grantee as of the grantor, and a man or single woman can not therefore be allowed to use the law as a weapon of offense against the rights of others, or a shield to cover his or her own fraud. The provision of the Code requiring the conveyance of a married woman to be acknowledged in a certain way was intended solely for her own protection, and she should not be deprived of its use as a shield against the fraud or oppression of others. The court has gone as far as the existing statutes will allow, in holding that she can not shield herself behind the mistakes of a third person in certifying to her acknowledgment.

Texas.—A married woman is no more permitted by law to perpetrate a fraud than is a *feme sole*. To pass the title to her separate property, her conveyance must be in the mode prescribed by statute. When it is not so done, she is not estopped, unless because of representations and acts on her part relied and acted on, so as to operate as a fraud upon the opposite party if she were not estopped. Her acts and representations, in respect to her rights of property, made to deceive, and which do deceive others, to their injury, will be binding upon her.¹ But her declarations and acts made and done in ignorance of her rights, and not intended to deceive, do not estop her.²

A purchaser of land, the separate property of the wife, under a bond for a deed, paid part of the purchase price, took immediate possession of the land, and made permanent improvements thereon. The wife saw these improvements made, received the money paid, and ex-

¹ *Cravens v. Booth*, 8 Tex. 243; *Berry v. Donley*, 26 Tex. 746; *Fitzgerald v. Turner*, 43 Tex. 87.

² *Reagan v. Holliman*, 34 Tex. 413; *Bell v. Swarz*, 56 Tex. 357.

pendent it in improvements on her homestead. It was held that she was estopped from claiming title to this land, even though the bond showed no privy examination of the wife.¹

A mortgage executed by both husband and wife contained a stipulation that the land was not the homestead of the mortgagors. It was held that this covenant would not bind the wife unless, perhaps, connected with representations by her, which were intended to deceive and which actually did deceive appellees, married women not being estopped unless their conduct has been intentional and fraudulent.²

Her mere passivity and silence in regard to the dealings of third persons with her husband concerning her interests is not so strictly construed as evidence of constructive fraud as is the silence and seeming acquiescence of a man or a *feme sole* who permits, without objection, a third person to acquire interest in his or her property, to his pecuniary loss, on the faith that it belonged to another person. This is because of the duties which her marital relation imposes on her in respect to yielding to her husband the control of her separate property, without impeachment by her of his honor and integrity, and to approve by her silence and acquiescence his right to do whatever to him might seem proper for its management and control.³ The laws will not permit her, however, to practice deception and fraud upon innocent third persons, who come to deal with her husband, and to trust him on account of property.⁴ If, however, a purchaser knows of the wife's

¹ Clayton v. Frazier, 33 Tex. 99.

² Armstrong v. Moore, 59 Tex. 646.

³ John v. Battle, 58 Tex. 600.

⁴ O'Brien v. Hilburn, 9 Tex. 299.

rights in the property, she is not estopped by her deed not properly acknowledged, where no false representations are made by her.¹

§ 27. A married woman's right to sue and be sued.—*California*.—(a) *Before the Code*.—The Practice Act (April 29, 1851), section 7, required the husband to be joined with the wife, when she was a party to an action, except (1) when the action concerned her separate property, in which case she could sue alone, and (2) in actions between herself and her husband, when she could sue or be sued alone.² In 1868 this section was amended so as to make the first clause read: "When the action concerns her separate property [or her right or claim to the homestead property]."³

In 1870 an Act was passed, section 3 of which read as follows: "The wife, while living separate and apart from her husband, shall have the sole and exclusive control of her separate property, and may sue and be sued, without joining or being joined with her husband, and may avail herself of and be subject to all legal proofs in all actions, including actions concerning real estate."⁴

(b) *Under the Code*.—The Code provides that when a married woman is a party, her husband must be joined with her except (1) when the action concerns her separate property, or her right or claim to the homestead property, in which case she may sue alone; (2) when the action is between herself and her husband, in which case she may sue or be sued alone; and (3) when

¹ *Berry v. Donley*, 26 Tex. 746.

² *Hittell's General Laws*, 4946; *Snyder v. Webb*, 3 Cal. 83; *Kashaw v. Kashaw*, 3 Cal. 312.

³ *Hittell's General Laws*, 9109.

⁴ *Hittell's General Laws*, 8836.

she is living separate and apart from her husband, [by reason of his desertion of her, or by agreement in writing entered into between them,] in which case she may sue or be sued alone. The section originally did not contain the portion in brackets. This was inserted in 1874.¹

She may sue alone to recover for personal injuries sustained by her through the negligence of others, when she is living separate or apart from her husband by reason of his desertion of her.² But a temporary absence of the wife from the husband with his consent, does not come within the meaning of this Act. There must have been an abandonment on the part of the one or the other, or a separation which was intended to be final.³

If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.⁴

When the action concerns her separate property, and is not between herself and her husband, she may seek the aid of the court in company with him or without him. The statute in such cases is not obligatory upon her to sue alone.⁵ In respect to those cases in which she can sue or be sued alone, she is put upon a common

¹ Code of Civil Procedure, 370; *Blumenberg v. Adams*, 49 Cal. 308; *Matthew v. C. P. R.R.*, 63 Cal. 450. *Nevada*—Compiled Laws, 1070 (same as California, omitting any mention of Homestead): "When the wife is living separate and apart from her husband, she may sue and be sued alone." Compiled Laws, 175. When a married woman is a party plaintiff she must allege her right to sue alone. *Warren v. Quill*, 8 Nev. 218.

² *Andrew v. Runyon*, 4 West Coast Reporter, 81.

³ *Tobin v. Galvin*, 49 Cal. 36.

⁴ Code of Civil Procedure, § 371; *Nevada*—Compiled Laws, 1071.

⁵ *Deuprez v. Deuprez*, 5 Cal. 387; *Van Maren v. Johnson*, 15 Cal. 311; *Kays v. Phelan*, 19 Cal. 128; *Calderwood v. Pyser*, 31 Cal. 333; *Corcoran v. Dole*, 32 Cal. 90.

level with all other parties to actions, and hence all her property is likewise subject to seizure and sale under execution. She takes all the responsibilities of a suitor, and is liable for the payment of costs when unsuccessful.¹

She can sue her husband to recover money due on a promissory note executed by him to her before marriage.²

There is no statutory limitation as to the kind of actions which may be maintained by the wife, when they concern her separate property, on and against her husband.³

When she is sued for her ante-nuptial debts, her husband is a proper party defendant, he being liable to the extent of the community property.⁴

A married woman was, before the Code, an improper party to a suit to recover money loaned to her to purchase land which became common property.⁵ This would not be so under the Code. She is an improper party to a suit for *damages* to the common property.⁶

For an injury done to the person of a married woman, she must join in the action. Damages of this nature can not be recovered unless she is a party. In such an action the right of recovery does not extend to any matter for which the husband might sue alone.⁷

¹ *Alderson v. Bell*, 9 Cal. 321; *Leonard v. Townsend*, 26 Cal. 443; *Thomas v. Desmond*, 63 Cal. 426.

² *Wilson v. Wilson*, 36 Cal. 447.

³ *Wilson v. Wilson*, 36 Cal. 447.

⁴ *Keller v. Hicks*, 22 Cal. 462; *Post*.

⁵ *Althof v. Conheim*, 38 Cal. 230.

⁶ *Barrett v. Tewksbury*, 18 Cal. 334; *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526.

⁷ *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526; *Matthew v. C. P. R. R.*, 63 Cal. 450.

If, in addition to damages for the personal injuries, it is sought to recover for moneys expended for medicines, medical attendance, and similar causes, it must be alleged that the money so expended was the separate property of the wife. Unless this is alleged, it will be presumed that this money belonged to the community, for which the husband alone can sue.¹

Texas.—(a) *The right to sue.*—The statute provides as follows: "The husband may sue either alone or jointly with his wife, for the recovery of any separate property of the wife, and in case he fails or neglects so to do, she may, by the authority of the court, sue for such property in her own name."²

This being the general rule, the grounds of the exception to the rule which authorize the action to be prosecuted in the name of the wife separately, ought to be positively averred and proven. Without such averment and proof, the binding obligation of the judgment, if rendered against the wife, would be at least very questionable. No *previous* permission of the court is necessary to support the action. This is a matter of right, and can be granted as well during the progress as before the commencement of the action. In fact, no specific or express grant of power to sue is necessary. It will always be presumed, where the facts *pleaded* and proven are such as authorize the action to be maintained.³ If the wife has been apparently permanently

¹ *Mulvey v. Bain*, Superior Court of San Francisco (not reported); *Post*.

² *Pasch. Dig.* 4636; *Rev. Stats.* 1204; *Clay v. Power*, 24 Tex. 304; *Burleson v. Burleson*, 28 Tex. 417; *Holloway v. Holloway*, 30 Tex. 179; *Williams v. Turner*, 50 Tex. 143; *Turnley v. Texas B. & I. Co.*, 54 Tex. 452.

³ *McIntire v. Chappell*, 2 Tex. 379; *Wallace v. Finberg*, 46 Tex. 45; *Edwards v. Dismukes*, 53 Tex. 612; *John v. Battle*, 58 Tex. 596; *Mitchell v. Wright*, 4 Tex. 283; *O'Brien v. Hilburn*, 9 Tex. 293.

abandoned by her husband, she may sue alone. This fact of permanent abandonment must appear by her petition. If facts exist which will defeat the right of the wife to sue alone, but such facts do not appear upon the face of the petition, they must be pleaded by the defendant under oath and proven.¹ The same rule applies if the husband is insane.²

The fact that a suit for divorce is pending has been held not, of itself, sufficient to constitute an exception under which she can sue apart from her husband.³ When, however, in consequence of any authorized act of the husband, violative of her marital rights, it becomes necessary for her to resort to suit, there is no necessity that she should join him in the action. In such a case, if it be necessary that the husband be made a party to the suit, it should be, it would seem, in the character of a defendant, rather than of plaintiff.⁴ When the interests of the husband and wife in the subject matter of the action are in conflict, they should *not* be joined as parties.⁵ She can maintain alone a suit against her husband to protect her separate property. She can foreclose a mortgage executed by the husband to her upon community property to secure a separate debt due by him to her, or she can maintain a suit by attachment levied on community property to secure payment of a debt (her separate property) due to her from him. In short, "she is entitled, in a proper case, to the benefits of writs of attachment, sequestration,

¹ *Rosenbaum v. Harloe*, Tex. Court of Appeals (Civil Cases), §§ 849, 851.

² *Jacobs v. Cunningham*, 32 Tex. 775; *Forbes v. Moore*, 32 Tex. 195.

³ *Mitchell v. Wright*, 4 Tex. 286.

⁴ *O'Brien v. Hilburn*, 9 Tex. 298; *Cannon v. Hemphill*, 7 Tex. 200; *Hartley v. Frosh*, 6 Tex. 215; *McKay v. Treadwell*, 8 Tex. 176.

⁵ *Marston v. Ward*, 35 Tex. 600.

injunction, or any like writ, to which any other creditor would be entitled, in order to protect and preserve her rights. Of course, writs of this character between husband and wife ought not to be encouraged, and ought in every instance to be scrutinized very closely by the courts, and every effort made to prevent fraud and collusion between them, to the prejudice of the rights of (other) creditors or third parties."¹ She can not maintain a suit in regard to community property, unless she is abandoned by her husband.² She can not, therefore, be a party to a suit for the recovery of damages for a personal trespass committed on herself, as such damages, when acquired, would be community property, for which the husband must sue alone.³

It may be stated as a general rule that the wife can both institute and defend a suit without the joinder of of her husband, *whenever such action becomes necessary for the protection of her separate property.*⁴

When a married woman sues as administratrix, she must join her husband with her.⁵

If the averment of the cause of the husband's failure or right to join his wife in a suit is omitted in her original petition, she may amend and plead such cause in her amended petition.⁶

The authority conferred upon a married woman, to litigate in her own right, implies the capacity on her part to conduct the litigation as shall be most conducive

¹ Price v. Cole, 35 Tex. 471; Hall v. Hall, 52 Tex. 298; Ryan v. Ryan, 61 Tex. 473.

² Kelley v. Whitmore, 41 Tex. 648.

³ T. C. Ry. Co. v. Burnett, 61 Tex. 638.

⁴ Black v. Black, 3 Tex. Law Reporter, 374.

⁵ Mitchell v. Wright, 4 Tex. 286; *Post*.

⁶ Jacobs v. Cunningham, 32 Tex. 775.

to her own advantage. The law has conferred on her the right to litigate; and the right implies the capability. It is a consequence of her capacity to sue and be sued in her own right, that she must be held to the use of the ordinary diligence of other suitors, where she is not specially exempted by law from the use of such diligence. Otherwise, there would be no conclusiveness in judgments to which married women are parties.¹

Abatement.—A suit instituted by a *feme sole* shall not *abate* by her marriage, but upon a suggestion of such marriage being entered on the record, the husband may make himself a party to such suit and prosecute the same as if he and his wife had been originally parties thereto.²

(b) *The right to be sued.*—(1) *Debts for necessities and for benefit of separate estate.*—The husband and wife shall be *jointly* sued for all debts contracted by the wife for necessities furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property.³

Upon the trial of any suit for such indebtedness, if it shall appear to the satisfaction of the court and jury that the debts so contracted or the expenses so incurred were for such purposes, and also that the debts so contracted or the expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff.⁴ The

¹ Cayce v. Powell, 20 Tex. 771.

² Pasch. Dig. 8; Rev. Stats. 1252.

³ Pasch. Dig. 4643; Rev. Stats. 1205; Hall v. Dotson, 55 Tex. 522.

⁴ Pasch. Dig. 4644; Rev. Stats. 2855; Cartwright v. Hollis, 5 Tex. 152; Womack v. Womack, 8 Tex. 415; Haynes v. Stovall, 23 Tex. 627; George v. Stevens, 31 Tex. 674; Smotridge v. Lovell, 35 Tex. 59; Milburn v. Walker, 11 Tex. 331; Harris v. Williams, 44 Tex. 124.

petition must allege that the debt was incurred by the wife for necessities for herself or children (not for the *family*), or that it was an expense incurred by her for the benefit of her separate estate, and that it was reasonable and proper.¹

A petition on a joint note of the husband and wife, which does not aver that the debt was contracted for any purpose that could fix a liability upon her, states no cause of action against her, and a judgment by default on such a petition is erroneous.²

A petition which alleges facts from which it is plainly inferable that the debt is one properly chargeable upon the separate property of the wife is sufficient upon *general* demurrer, although it does not distinctly allege that the debt was *reasonable*.³

(2) *Contracts of wife*.—The husband and wife shall also be jointly sued for all separate debts and demands against the wife, but in such case no personal judgment shall be rendered against the husband.⁴

The privy examination, acknowledgment, and declaration before the officer, as required by the statute, are the essence and foundation of the obligation of the deed of a married woman. Facts so fundamental in fixing the liability of a married woman in a suit arising out of any conveyance by her of her separate property must be averred.⁵

¹ *Brown v. Ector*, 19 Tex. 346; *Laird v. Thomas*, 22 Tex. 281; above authorities.

² *Trimble v. Miller*, 24 Tex. 214; *Covingtons v. Burleson*, 28 Tex. 371.

³ *Harris v. Williams*, 44 Tex. 124; *Rosenbaum v. Hasloe*, Tex. Court of Appeals (Civil Cases), § 850.

⁴ Rev. Stats. 1206; Pasch. Dig. 9; *Howard v. North*, 5 Tex. 297; *Carothers v. McNese*, 43 Tex. 223.

⁵ *Roy v. Bremond*, 22 Tex. 626; *Cross v. Everts*, 28 Tex. 532.

(3) *Ante-nuptial contracts*.—It was for a while held that the husband must be joined in a suit against the wife on an *ante-nuptial contract* of her's, but only *pro forma*, as the judgment could not be enforced against his separate property.¹ Subsequently this rule was changed, and it was held that he was a *necessary* party defendant in such an action, not simply because the statute so required, but because he was liable for her ante-nuptial debts to the extent of the community property, the legal title to which is in him.²

(4) *General rights as litigants*.—The courts recognize the rights of married women to appear in the tribunals, as litigants; and while they have the privilege of appearing, and are under legal obligation to appear as litigants, the courts are obliged to apply to them the same rule that applies to other parties, litigating their rights in the courts.³ It was accordingly held that, in a suit against a married woman on a promissory note, where the petition did not allege that she was a married woman when the note was executed, and she did not plead this as a defense, it was too late to come in afterwards and move in arrest of judgment on that ground.⁴ She may make compromises and waive errors in proceedings against her as if she were a *feme sole*.⁵

It will be noticed that the statute gives the husband the right to *sue* alone for the benefit of the wife, but not to *defend* alone.⁶

¹ Nash v. George, 6 Tex. 236; Roundtree v. Thomas, 32 Tex. 286.

² Taylor v. Murphy, 50 Tex. 292; *Post*.

³ Baxter v. Dear, 24 Tex. 21.

⁴ Phelps v. Brackett, 24 Tex. 237.

⁵ Cayce v. Powell, 20 Tex. 771; Laird v. Thomas, 22 Tex. 281.

⁶ Read v. Allen, 56 Tex. 194.

§ 28. The Statute of Limitations as applicable to a married woman.—*California*.—The Statute of Limitations did not originally apply to married women. Coverture was a disability, during the continuance of which the statutes did not apply.¹ In 1863 this was amended so as to limit it to actions in which the husband was a necessary party with her.²

Sections 328 and 352 of the Code of Civil Procedure provide that if a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, or to commence any other action, be a married woman and her husband be a necessary party with her in commencing such action or making such entry or defense, the statute does not run against her during such coverture.³

*The statute runs against her when she may sue or be sued alone.*⁴

Texas.—Real actions.—The statute provides as follows: "If a person entitled to commence suit for the recovery of real property, or to make any defense founded on the title thereto, be, at the time such title shall first descend or the adverse possession commence, . . . a married woman, . . . the time during which such disability shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or the making of such defense; and such

¹ Stats. 1850-3, p. 818, 820; Stats. 1850, p. 343.

² Stats. 1863, p. 325.

³ *Nevada*.—Compiled Laws, 1037.

⁴ *Wilson v. Wilson*, 38 Cal. 450; *Kapp v. Griffith*, 42 Cal. 411; *Cameron v. Smith*, 50 Cal. 303.

person shall have the same time, after the removal of her disability, that is allowed to others by the provisions of this chapter.”¹

Personal actions.—The same rule applies to both real and personal actions.² When a note is executed during coverture, payable to the wife, the presumption that it is community property causes the statute to run against it;³ and when the title to real property is in a married woman, and so continues until within the period of limitation pleaded, one claiming adversely must show an entry prior to the vesting of title in her.⁴

The husband can not, by virtue of his general authority to manage and control the separate property of the wife, revive, as against that property, a claim which had become barred by the Statute of Limitations.⁵ When the running of the statute is started by the death of the husband, it is not stopped by the second marriage of the widow.⁶ Long acquiescence does not bar the claims of a married woman. Yet, where there has been no constraint or ignorance of her rights, the defendant is not put to as stringent proof as in other cases.⁷

A married woman can claim the benefit of the Statute of Limitations to *protect* her property equally as if she were a *feme sole*.⁸ This was very plainly illustrated in the comparatively recent case of *Wofford v. Unger*.⁹ The facts of this case were as follows: A note was exe-

¹ Rev. Stats. 3201; Pasch. Dig. 4621-4, 4603.

² Rev. Stats. 3222; Pasch. Dig. 4617.

³ *Wells v. Cockrum*, 13 Tex. 127.

⁴ *Sterrett v. Middleegee*, 44 Tex. 536.

⁵ *Milburn v. Walker*, 11 Tex. 344; *Wofford v. Unger*, 55 Tex. 484.

⁶ *McDonald v. McGuire*, 8 Tex. 361.

⁷ *Allen v. Urquhart*, 19 Tex. 486.

⁸ *Reynolds v. Lansford*, 16 Tex. 286.

⁹ *Wofford v. Unger*, 55 Tex. 481.

cuted by the husband and wife, and a mortgage given by the wife on her separate property to secure the same. After the maturity of the note the husband went into bankruptcy, and the note was proven up in bankruptcy before it was barred by limitation. Suit was brought to enforce the mortgage, and judgment went for both husband and wife under plea of Statute of Limitations. This judgment was reversed on appeal. On a second trial judgment was rendered against the husband and in favor of the wife, upon the same plea. On an appeal from this judgment the court said: "The general question presented on the first appeal was whether the proof of the debt in bankruptcy against the husband was sufficient to arrest the Statute of Limitations. This was decided in the affirmative, the record *not showing* that the mortgage property was the separate property of the wife, and the presumption arising that it was community property, and that therefore, as the debt was not barred as against the husband, the remedy on the mortgage would not be barred. In the present appeal the record shows *affirmatively* by the finding of the court, that the mortgage was upon the separate property of the wife. . . . Had the mortgage been upon the separate property of the husband, or upon the community property of himself and wife, we would have no hesitancy in deciding that so long as the debt was not barred as to the husband, the mortgage, being a mere incident thereto, could be enforced. But we are of the opinion that the same rule does not apply to the mortgage given in this case by the wife upon her separate property. The record does not show that the consideration of the note was a charge upon her separate property. No personal judgment could be rendered against her and none

was sought. She could, however, under separate decisions of this court, charge her separate property, as was done in this case, by the execution and delivery of a mortgage to secure the debt of the husband. It is well settled that, in such cases, the property thus mortgaged will be treated in all respects as a surety or guarantor. . . . The Statute of Limitations will commence to run in favor of a surety or guarantor from the time he is liable to suit, and in favor of a mortgagor from the time the mortgagee's right of action accrues. . . . If, instead of the property of the wife being the surety, it was an individual third party, and suit had not, as in the present case, been brought against him until after four years from the maturity of the note, he could plead the statute in bar, and in our opinion the same rule would apply to a wife."

Certain property was claimed by reason of five years' possession under a deed duly recorded. It was shown that the grantor in the deed was, at the time of its execution, a married woman, but this did not appear upon the face of the deed. It was held that the statute, in providing that the party in possession, "claiming under a deed or deeds duly registered, shall be held to have full title, precluding all claims," intended an instrument of writing which by its own terms, or with such aids as the law requires, assumes and purports to operate as a conveyance, and that the question of power to make the deed was not involved. (This is what is meant by the phrase "claiming under color of title.") The deed was therefore held sufficient to support the plea of the Statute of Limitations.¹

¹ Fry v. Baker, 59 Tex. 405.

§ 29. Effect of marriage upon the rights of a feme sole minor as regards the Statute of Limitations.—The rule is well settled that one disability can not be tacked on to another so as to prolong the period prescribed before the statute can apply. When the disability ceases that exists at the time the cause of action accrues, the statute commences to run.

In California the Code provides that no person can avail himself of a disability, unless it existed when his right of action accrued.¹ In Texas the Revised Statutes provide that the period of limitation shall not be extended by the connection of one disability with another; and when the law of limitations shall begin to run, it shall continue to run, notwithstanding any supervening disability of the party entitled to sue or be sued.² It would therefore follow from these provisions that the marriage of a woman under the age of majority would not operate to extend the time during which the statute could not run against her.³ In Texas the effect of such a marriage is to start the statute running against the wife, as every female under the age of twenty-one years is deemed of full age from and after her marriage,⁴ and the disability of infancy having terminated, that of marriage can not be added thereto.

In California this question has never come before the Supreme Court. Before the Code a provision similar to the one in Texas existed, but it was not enacted in the Code.⁵ It would seem to follow, therefore, that, under section 352 of the Code of Civil Procedure, *supra*, the statute would not be started nor would it be delayed in commencing to run against a female minor by her marriage.

¹ Code of Civil Procedure, § 357.

² Rev. Stats. 3225.

³ *White v. Latimer*, 12 Tex. 61; *Ford v. Clements*, 13 Tex. 592.

⁴ Rev. Stats. 2859; Pasch. Dig. 4642; *Thompson v. Cragg*, 24 Tex. 582; 38 Tex. 649; *Post*.

⁵ *Post*.

CHAPTER IV.

COMMUNITY PROPERTY.

- § 30. Definition.
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- § 42. Earnings of the wife.
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- § 44. Liability of the community property for the debts of the wife contracted *during marriage*.
- § 45. Liability of the community property for the torts of the wife.

§ 30. Definition.—*California*.—(a) *Before the Code*.—The legislature copied the Spanish laws very closely in providing for community property. With the exception that there was at first no provision in the California law

for a gift to the husband and wife *jointly*, there was no substantial difference between it and the Spanish law.¹

The Act of 1850, "defining the rights of husband and wife,"² provided as follows: "All property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be community property;" and also, "the rents and profits of separate estates of either husband or wife shall be deemed common property." This latter provision was, as we have seen, declared unconstitutional.³

(b) *Under the Code*.—Section 164 of the Civil Code provides that all property, other than separate property, acquired after marriage by either husband or wife, or both, is common property.⁴ This Code makes one important change in the law as it first read, in that it adopts the ruling of the court, and provides that the rents, issues, and profits of the separate property is *separate property*.

Texas.—In 1840 an Act was passed providing that "all property which the husband or wife may bring into the marriage, except land and slaves and the wife's paraphernalia, and all the property acquired during the marriage, except such land or slaves or their increase, as may be acquired by either party by gift, devise, or descent, and except also the wife's paraphernalia acquired as aforesaid, and during the time aforesaid, shall be the common property of the husband and wife."⁵

¹ *Panand v. Jones*, 1 Cal. 514; *Meyer v. Kinzer*, 12 Cal. 252; *Scott v. Ward*, 13 Cal. 472; *Packard v. Arellanes*, 17 Cal. 538.

² *Ante*, § 11.

³ *Ante*, § 14.

⁴ *Nevada*.—Compiled Laws, 152.

⁵ *Pasch. Dig.* 4642; *Portis v. Parker*, 22 Tex. 701.

It was accordingly held that a wagon and some cattle owned before marriage by one of the parties became common property.

In 1848 this Act of 1840 was amended to read as follows: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, shall be deemed the common property of the husband or wife, and during the coverture may be disposed of by the husband only."¹

The principle that lies at the foundation of the whole system of community property is that whatever is acquired by the joint efforts of husband and wife shall be their common property, and the law conclusively presumes that whatever is acquired by either husband or wife, or by both, except by gift, devise, or descent, or by the exchange of one kind of property for another, is acquired by their joint efforts.²

Owing to the fact that, in Texas, the increase of *lands* and *slaves* only becomes separate property, and that the "*increase of lands*" has been defined not to mean the products or crops grown out of the land, this principle is easy of application. In California the subject is much complicated by the fact that the statute declares the "rents, issues, and profits" of all the separate property to be also separate property. This will include much, if not all, that is acquired by labor expended in the making of these "rents, issues, and profits." In Texas, as we have seen, under a law giving the husband the management of the wife's separate property, crops grown on the land of the wife, by the labor of his or her slaves, belong to the community,

¹ Pasch. Dig. 4642; Rev. Stats. 2852.

² De Blane v. Lynch, 23 Tex. 27.

crops not being the "increase of lands" meant by the statute. In California, under the same law, crops grown on the land of the wife, by the labor of the husband, belong to her separately, crops being the "issues or *profits*" of land as meant by the statute.¹

Husband and wife can not, by a post-nuptial agreement that one-half of the profits of a business shall be the separate property of the wife, change their property rights to those of partners, or convert community property into the separate property of the wife.²

§ 31. Examples of community property.—*California*.—At the time of the marriage a man was in possession of certain lots to which he had no title. After the marriage he purchased the lots with community funds. It was held that the lots were community property.³

A woman, at the time of the marriage, was living upon public land to which she had no title. The husband entered and purchased the land in his own name.

¹ *Ante*, § 14.

In the West Coast Reporter, Vol. 4, pages 193, 357, and 389, the very able editor, J. N. Pomeroy, discusses this question, and takes issue with the construction placed upon this statute in Nevada by the Supreme Court in *Lake v. Lake* (*ante*, page 21), and in California by the Supreme Court (*ante*, § 14), and by the Bar in their daily practice. He says: "I can not believe, however, that the phrase, 'rents, issues, and profits,' as thus used in the Code, is intended to include any of the increase and products, made by a husband in carrying on a business, in which he is constantly buying and selling and exchanging, and is using his own labor and skill in producing the increase from his separate property, as his original capital." Such, however, is the construction put on this phrase (*ante*, § 14), and necessarily so, because there can be no practical middle course between this rule and its opposite as adopted in Texas, that is, that such "*rents, issues, and profits*" belong to the community. Inextricable confusion would follow any arbitrary rule, prescribing that so much of such *increase* is separate and so much is common property.

² *Cox v. Miller*, 54 Tex. 25.

³ *Johnson v. Johnson*, 11 Cal. 205.

Subsequently the husband and wife sold the land, and with the proceeds the husband purchased other land. It was held that this land so purchased was community property.¹

A man, at the time of the marriage, was in possession, without right, of a tract of land. After his marriage he gave up possession of a portion thereof to the rightful owners, who, in return, deeded to him the remainder of said tract of which he was in possession. It was held that this land so deeded was community property.²

A father and his sons boarded with a family and became indebted for board in a considerable sum. It was held that this indebtedness was due to the *community* and was therefore community property.³

Texas.—The husband purchased a slave for \$800, and paid \$330 of his own money, \$300 with profits made during the marriage, and left \$170 unpaid at the time of his death. It was held that the husband had a separate interest in the slave proportionate to the amount paid by him, the community had an interest proportioned to the part not so paid, and the balance due was a charge against the community.⁴

Land was purchased and the deed taken in the name of the wife. The consideration was paid partly with a negro belonging to the wife, a yoke of oxen belonging to the community, and the note of the husband for the balance. It was held that the land was her separate property to the extent of the value of the negro, and

¹ *Eslinger v. Eslinger*, 47 Cal. 62.

² *Pancoast v. Pancoast*, 57 Cal. 320.

³ *Read v. Rahm*, 3 West Coast Reporter, 151.

⁴ *Love v. Robertson*, 7 Tex. 6.

community property to the extent of the value of the oxen and note. Judgment was obtained on the note and the property sold. It was held that the sheriff's sale passed only the community interest.¹

Where, in a similar purchase, the consideration was paid in part with the funds of the wife that were held in trust for her by her husband, it was held that a sale of the land by the assignee, in bankruptcy proceedings against the husband, passed only the interest of the husband and of the community, but not the interest of the wife, as measured by the amount of the consideration paid by her.²

Land purchased, after the death of the wife, with community funds, belongs to the community, and the husband holds it in common with the children of his deceased wife.³

Buildings erected by joint labors or funds upon the separate property of one of the marital partners, belong to the partner who owns the land, but the community estate must be reimbursed for their cost.⁴ Improvements made during marriage on lands, the separate property of husband or wife, are deemed to be common property unless it be shown that they were made with the separate funds of the husband or wife.⁵

If the purchase money furnished by the wife is her own *earnings*, the property will belong to the community, unless it be shown that the husband intended to make it a gift to her.⁶

¹ Claiborne v. Tanner, 18 Tex. 69.

² John v. Battle, 58 Tex. 593.

³ McAlister v. Farley, 39 Tex. 552.

⁴ Rice v. Rice, 21 Tex. 67.

⁵ Rice v. Rice, 21 Tex. 67.

⁶ Johnson v. Burford, 39 Tex. 249.

Land acquired by pre-emption is common property, whether the husband or the wife be the pre-emptor.¹

Money borrowed by either the husband or wife to invest in business, becomes community property. The fact that this money so borrowed, is, *after* it has been invested in business, *given* to the borrower, does not change it from community into separate property. The only effect of the gift is to annul the obligation to repay. In a recent case a very interesting decision was rendered upon this question: The husband was in debt and insolvent. The wife borrowed some money and invested it in a saloon. The business was conducted in her name, and the family was supported out of the proceeds. The court held that this money was community property and said: "If she had received the money by gift, devise, or descent, it would have been separate property, without doubt, and she might have invested it in business without losing the exemption. But to borrow money for the purpose of engaging in business, is quite a different matter. If the husband should borrow money for such a purpose, it would certainly become community property. Upon what principle can the wife borrow money and make it her separate property? We conclude that the money was community property and the property purchased with it, liable to execution for the debts of the husband." The court intimated that if the persons who loaned this money had made it a gift to her, but after its actual investment, "then the effect of the gift would be, not to change the precedent character of the property, but merely to release the donee from the obligation of repayment."²

¹ Allen v. Harper, 19 Tex. 502.

² Herschell v. Blum, 3 Tex. Law Reporter, 178.

Property acquired during the marriage, by reason of a personal trespass committed upon the wife, belongs to the community.¹

Colonial grants and headright certificates.—The underlying principle of the laws of community property, to wit: the joint acquisitions of the husband and wife, is nowhere more forcibly illustrated than in the decisions regarding colonial grants. In *Hodge v. Donald*² the question arose as to whether certain land was community or separate property, the following being the facts of the case: A man with his wife and children emigrated to Texas in 1845 and settled within the limits of the colony granted by the Republic to U. S. Peters and others, and known as "Peters' Colony." They lived upon a tract of land of one hundred and forty acres until the summer of 1849, when the wife died. After her death the father, by virtue of his and his wife's emigration and settlement prior to July 1, 1849, obtained a certificate for six hundred and forty acres. It was held that this was community property, and the court said: "Although the certificate or title, under the law, issued to the husband as the head of the family, yet in consideration of the *joint toils, privations, and dangers undergone by the wife also*, it has been separately decided by this court that under our system it would constitute community property of the husband and wife. This accords with the general policy of our law upon the subject of marital rights. . . . In some cases where the wife died soon after her arrival into Texas, the subsequent grant to the husband has been

¹ *Ezell v. Dodson*, 60 Tex. 331; *T. C. Ry. Co. v. Burnett*, 61 Tex. 638.

² *Hodge v. Donald*, 55 Tex. 344.

held to be his separate property, and not community, as in *Webb v. Webb*.”¹ These cases will be found to be those in which the death of the wife occurred before there had been a sufficient compliance with the conditions upon which the land was offered, to have *them* entitle either the husband or the wife to demand it, upon equitable principles or under the terms of the law, and the subsequent grant to the husband was held to be his separate property, upon the ground that the consideration passed from him alone, and not from both him and the deceased wife.

In other cases, in which the death of the wife occurred subsequently to a substantial compliance with the conditions upon which the grant was offered, it has been decided that it was community property.²

The true test, as we deduce from the authorities, is this: *First*—Did the surviving husband receive the grant by reason of such immigration, settlement, residence, etc., on his own part, as would, under the law, entitle him to it, *independently* of the right based upon his *status* as a *married man* at the date of the death of the wife? If so, it was his separate property. *Second*—Was the increased quantity after that to which as a single man, not the head of a family, he was entitled, given to the surviving husband *by reason of the fact* that, at the date of the death of the wife, he was then a married man? If so, it was community property of the husband and the deceased wife, her half interest in which, subject to the debts of the community, would descend to her children.³

¹ *Webb v. Webb*, 15 Tex. 274.

² *Yates v. Houston*, 3 Tex. 433; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Cannon v. Murphy*, 31 Tex. 405; *Carter v. Wise*, 39 Tex. 273.

³ *Budd v. Johnson*, 2 Tex. Law Reporter, 316.

When land was granted by the Republic of Texas to a man *because* he was married, it became community property, even though the grant bore date after the death of the wife.¹

Land acquired under headright certificates issued under the law of 1837 became community property.²

§ 32. Presumption as to community property.—All property acquired during marriage is presumed to be common property. The burden of proof is on the party claiming it as separate property to show it by very clear testimony.

The fact that property is *purchased*, precludes the supposition of acquisition by gift, bequest, devise, or descent. In the absence of clear and decisive proof that the purchase was made with separate funds, the presumption is absolute and conclusive that the property is community property. This is a presumption of *law* arising from the *fact* that a *purchase* has been made *during coverture*. It is much easier for the *party purchasing* to show affirmatively that the funds or property used were separate property of such party, than for others interested to show *negatively* that they were not. The evidence is peculiarly within the knowledge and control of such party. The law therefore throws the burden of identifying the funds or property used as a part of the separate estate upon the party claiming the benefit of such separate estate.³

¹ Caruth v. Grigsby, 57 Tex. 264; Carter v. Wise, 39 Tex. 273.

² Parker v. Chance, 11 Tex. 517; Thomas v. Chance, 11 Tex. 637; Burris v. Wideman, 6 Tex. 232; Wheat v. Owens, 15 Tex. 243; Wright v. McGinty, 37 Tex. 733.

³ Alverson v. Jones, 10 Cal. 9; Smith v. Smith, 12 Cal. 224; Meyer v. Kinzner, 12 Cal. 252; Tryon v. Sutton, 13 Cal. 493; Pixley v. Huggins, 15

In *Schmeltz v. Garey*, 49 Tex. 49, the court said : "The means invested should have been traced back to the separate estate, not through indefinite channels and unknown changes, but connectedly and plainly."

The mere fact that a deed or bill of sale is in the name of the wife is not even *prima facie* evidence of her separate interest in it. The interests of the husband and wife in community property are equal, and it is immaterial whether the grant or deed be made to them jointly, or to either separately.¹

This presumption runs in favor of the *community* only. There is no presumption that property in the possession of husband and wife belongs to the *husband* rather than to the *wife*.²

If land is purchased by a man just before the death of his wife, and he marries again, the payment of the purchase money soon after the second marriage raises

Cal. 131; *Mott v. Smith*, 16 Cal. 557; *Kohner v. Ashenauer*, 17 Cal. 581; *Burton v. Lies*, 21 Cal. 91; *Adams v. Knowlton*, 22 Cal. 288; *Riley v. Pehl*, 23 Cal. 70; *Tustin v. Faught*, 23 Cal. 241; *McDonald v. Badger*, 23 Cal. 399; *Landers v. Bolton*, 26 Cal. 420; *Ramsdell v. Fuller*, 28 Cal. 42; *Peck v. Vandenberg*, 30 Cal. 42, 55; *Bernal v. Gleim*, 33 Cal. 668; *Althof v. Conheim*, 38 Cal. 233; *Moore v. Jones*, 63 Cal. 12; *Schuler v. Savings and Loan Society*, 1 West Coast Reporter, 125; *Lott v. Keach*, 5 Tex. 394; *Love v. Robertson*, 7 Tex. 6; *Wood v. Wheeler*, 7 Tex. 20; *Huston v. Curl*, 8 Tex. 239; *Chapman v. Allen*, 15 Tex. 278; *Rice v. Rice*, 21 Tex. 66; *De Blane v. Lynch*, 23 Tex. 25; *Brackett v. Devine*, 25 Tex. 194; *Mitchell v. Marr*, 26 Tex. 329; *Cooke v. Bremond*, 27 Tex. 459; *Zorn v. Tarver*, 45 Tex. 520; *Schmeltz v. Garey*, 49 Tex. 49; *Cox v. Moeller*, 54 Tex. 25; *Zorn v. Tarver*, 57 Tex. 390; *Collins v. Turner*, Texas Court of Appeals (Civil Cases), § 517; *Browder v. Clemens*, 61 Tex. 587; *Pearce v. Jackson*, 61 Tex. 644.

¹ *Meyer v. Kinzer*, 12 Cal. 253; *Pixley v. Huggins*, 15 Cal. 131; *Tryon v. Sutton*, 13 Cal. 494; *McDonald v. Badger*, 23 Cal. 399; *Parker v. Chance*, 11 Tex. 517; *Smith v. Strahan*, 16 Tex. 314; *Higgins v. Johnson*, 20 Tex. 389; *Mitchell v. Marr*, 26 Tex. 331; *Tucker v. Carr*, 39 Tex. 98; *Johnson v. Burford*, 39 Tex. 242; *Zorn v. Tarver*, 45 Tex. 520; *Veramendi v. Hutchins*, 48 Tex. 550; *McDaniel v. Weiss*, 53 Tex. 259.

² *Edrington v. Mayfield*, 5 Tex. 368.

no presumption that this money belonged to the community fund of the husband and the second wife.¹

§ 33. Rebutting of this presumption.—*California*.—In California this presumption may be rebutted, not only as between the parties and those claiming under them *with notice*, but also those claiming under them *without notice*. When property is acquired during coverture, and the deed is taken in the name of the husband alone, a purchaser from the husband is equally protected, whether the property belongs to the community or to him separately. If the title to the property be in the name of the husband and wife, or of the wife alone, the purchaser from the husband or from the wife can hardly be said to purchase *without notice*. If he purchases from the wife, he is bound to ascertain her rights and powers.² If he purchases from the husband, the fact that the title is in a woman is sufficient to put him upon inquiry. In this regard, the court in *Ramsdell v. Fuller*,³ a case in which land was purchased during coverture and the deed taken in the name of the wife, said: "The deed, then, so far as shown on its face, might have conveyed a title absolute to a *feme sole*; a separate estate to a *feme covert*; or an estate in common to a husband and wife. Upon the best view for plaintiff, the deed upon its face was equivocal. But it afforded to all persons seeking to acquire title under it a clue to the title, which they were bound to pursue, or suffer the consequences of their laches. The grantee is a woman. The presumption of law is

¹ *Medlenka v. Downing*, 59 Tex. 32.

² *Kohner v. Ashenauer*, 17 Cal. 581.

³ *Ramsdell v. Fuller*, 28 Cal. 44.

that she is sole, and *prima facie* a conveyance from her would pass the title. But she may be married, and her deed may not pass the title. The fact as to whether she is married or single, all parties dealing with the land must ascertain, or omit to do so at their peril. So, also, if a grantee of a conveyance for a money consideration is a married woman at the date of the conveyance, *prima facie* a conveyance by the husband in his own name, of the land so conveyed to the wife, will be presumed to pass the title; but in fact it may not, for the reason that the land may still be the separate property of the wife, which he has no power to convey. And in such cases, as in the case last mentioned, all parties claiming title through the husband to lands, the title to which never stood in his name, must ascertain, at their peril, whether he did in fact have the power to convey. The record title in this case was notice to all the world that the land in dispute might be the separate property of Mrs. Fuller, and every party dealing with it did so at his peril. The plaintiff was by the record put upon inquiry as to the true condition of title."

Parol testimony may be introduced to show that the money consideration expressed in a conveyance to a married woman came from her separate estate.¹

Texas.—This presumption may, *as between themselves and those claiming under them with notice*, be rebutted by proof that the purchase was made with the separate funds of either party.²

In *Zorn v. Tarver* certain land sold under a judgment

¹ *Peck v. Vandenberg*, 30 Cal. 42.

² *Love v. Robertson*, 7 Tex. 6; *Huston v. Curl*, 8 Tex. 239; *Durham v. Chatham*, 21 Tex. 244; *Smith v. Boquet*, 27 Tex. 512; *Zorn v. Tarver*, 45 Tex. 520; *Stanley v. Epperson*, 45 Tex. 645.

against the husband was purchased by a cousin of the wife, and conveyed to the wife for a consideration much less than the value of the land, being the amount paid by this cousin for the land. A part of this land was subsequently sold and the proceeds applied to the payment of this consideration. In the first decision, as the testimony did *not* show that this consideration was paid with the separate funds of the wife, and as the deed purported to be for an onerous consideration, it was held that as to so much of the land as was conveyed in consideration of the repayment to the cousin of the amount it cost her, the presumption as to community property was not rebutted. In the second decision, upon proof that "a part of the land was sold, and from the proceeds of the sale the amount recited in the bond as the consideration, together with the interest, was repaid," it was held that the remainder of the land became her separate property as a gift from the cousin.

A *bona fide* purchaser from the husband, for a valuable consideration and *without notice*, of real property acquired during marriage by deed taken in the name of the wife and reciting a valuable consideration, is not thereby put upon inquiry as to any equity the wife may have in respect to it, but is justified and protected in purchasing it as community property. As to such a purchaser the presumption that property so acquired is community property can not be rebutted by parol evidence.¹ The same rule has been applied in case of a mortgage of land by the husband, which had been

¹ Mitchell v. Marr, 26 Tex. 331; Brackett v. Devine, 25 Tex. (Supp.) 194; Cooke v. Bremond, 27 Tex. 457; Kirk v. Nav. Co., 49 Tex. 215; French v. Strumberg, 52 Tex. 109; Veramendi v. Hutchins, 48 Tex. 550; Wallace v. Campbell, 54 Tex. 88.

deeded to the wife during coverture by a deed reciting that the purchase money was paid by her, which, however, did not recite that the purchase money was the wife's separate property, and this, even though the land was bought with the separate means of the wife.¹

These cases all proceed upon the theory that the purchaser in good faith may rely upon the real title being where by the deed it appears to be, and that he or she who wilfully or negligently permits property to stand in the name of another person, at least as apparent owner, can not be heard to say that such is not true, to the prejudice of a person, who, relying on the apparent ownership, has bought and paid a valuable consideration for the land.² This rule does not obtain when the question arises between husband and wife, parol evidence being admissible to show an understanding between them that real estate conveyed to her during coverture should be her separate property;³ nor does it apply to creditors having an apparent lien on the property by attachment, judgment, or otherwise.

Deeds to certain land were made to the wife during coverture. They purported to be deeds of sale for a valuable consideration, and were in the ordinary form of deeds to community property when taken in the name of the husband. It was proven that the consideration paid was community property, that it was by the husband credited upon an account due by him to the wife for her separate means used by him, and that the land was intended to be her separate property, but that there was no recital to that effect in the deeds.

¹ *Kirk v. Nav. Co.*, 49 Tex. 215.

² *Parker v. Coop*, 60 Tex. 111.

³ *T. and P. B. Co. v. Durrett*, 57 Tex. 53.

The judgment creditor of the husband purchased the land at an execution sale under his judgment, having no notice of the claim of the wife prior to the sale, at which time such notice was given. It was held that, being a lien creditor, not an innocent purchaser, he took title to the property by virtue of his judgment lien which had attached prior to such notice.¹ This decision was subsequently very severely criticized by the Court of Appeals, in *Wright v. Campbell*,² and distinguished, if not overruled by the Supreme Court in *Parker v. Coop*.³ In this case land had been purchased in the name of the wife, and the consideration paid was two other tracts of land, one of which was the separate property of the wife, and the other the property of the community. The deed recited that the consideration was paid by the wife, but not that it was paid out of her separate property, or that the land was conveyed to her to hold in her own separate right. Upon this state of facts the question arose: "Does an attaching creditor of the community, or one who through operation of law has acquired an apparent lien upon land which has been purchased, in whole or in part, with the separate means of the wife, occupy such a position as precludes the wife from proving the fact, and thereby having protection to the extent of her interest?" The answer of the court was this: "This question, we are of the opinion, must be answered in the negative. There is nothing in the relation of husband and wife which should place her in a more unfavorable position, with reference to her right to assert and maintain her right

¹ *Wallace v. Campbell*, 54 Tex. 87.

² *Wright v. Campbell*, 1 Tex. Law Reporter, 317.

³ *Parker v. Coop*, 60 Tex. 111.

to her separate property, than are other persons under the same circumstances.

“If a deed to land is made to A, in the absence of something upon its face to indicate that he holds in trust for some other person, by reason of such other person having paid the purchase money, or from some other reason, the law presumes, and persons dealing with A in reference to such property may, in the absence of notice to the contrary, rely upon the title being as it appears upon the deed; yet it is well settled if a judgment lien is acquired upon the land through a judgment against A, or through an attachment levied upon the land for his debt, that a person who is the real owner of the land by reason of his money having been paid for the land, may show such facts and defeat the lien or passing of title, if the same be done before sale; and this, upon the theory that the title of the real owner comes through operation of law which creates a resulting trust in his favor, which is the superior title and not affected by registration laws, that in many cases give protection not only to purchasers but to creditors also who have acquired liens. The law presumes that land conveyed to either the husband or wife during marriage is community property, nothing to the contrary appearing in the deed by which the conveyance is made; but certainly not more conclusively so, than it presumes that land conveyed to A belongs to him; and in the one case, as in the other, we see no reason why the facts may not be shown and protection given, if justified and called for by the facts.”

Wallace v. Campbell was distinguished from this case, the court saying: “In that case, as reported, it appears that the property which the wife claimed was

paid for with community funds. If so, the case stands upon different grounds to that now before us, for if the purchase money was paid with community funds, the subsequent credit given by the husband to himself on a debt due to his wife from him, could not have the effect of changing the title to the land from the community to the separate estate of the wife, for such subsequent transaction could not create a resulting trust in favor of the wife. The rule is thus tersely stated. The trust must result, if at all, at the instant the deed is taken, and the legal title rests in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself."

§ 34. Conveyances from husband to wife.¹—*California*.—In *Hussey v. Castle*² it was held that "the presumption does *not* arise, from a conveyance of this separate property of the *husband to the wife*, in consideration of money passing from the wife, which was her separate property, that the property thus conveyed becomes the common property of the husband and wife."

In *Wedel v. Herman*³ the court express a doubt as to whether the legal presumption, when a deed executed to a married woman expresses a valuable consideration, that the property becomes community property, prevails in such a deed executed by the husband to the wife, because under section 158, Civil Code, either is enabled to enter into any engagement or transaction respecting property which either might if unmarried.

¹ *Ante*, §§ 12, 20.

² *Hussey v. Castle*, 41 Cal. 241.

³ *Wedel v. Herman*, 59 Cal. 516.

*Texas*¹—The husband may make a gift or grant of property to his wife directly, without the intervention of trustees. This rule applies equally to community and to separate property. When the transfer or conveyance is directly from the husband to the wife, and is without consideration, the presumption is that it was intended to change the character of the property from community to the separate property of the wife. When property is conveyed to the wife during the coverture, and the separate means of the husband or the community effects make up the consideration, and the conveyance does not contain anything to indicate that it was intended as a gift, it may be shown by parol testimony that the deed was taken in the name of the wife by direction of the husband, with the intention of making it her separate estate.²

The same rule obtains when the consideration for such a conveyance is furnished by an outside party. In *Baker v. Baker*,³ it was shown that the consideration for a conveyance to a married woman was furnished by her husband's father; that the intention with which the money was furnished was to "buy the land for a home for the family and to have the deed made in the name of the wife," that the husband was improvident and in debt, and "that because of this indebtedness the deed was taken in the wife's name." Upon this and other similar evidence, the court said: "In our opinion the evidence shows clearly that the deed was taken in the name of the wife for the purpose of vesting title in her, and as between her and her husband such was its

¹ *Ante*, §§ 12, 20.

² *Morrison v. Clark*, 55 Tex. 443.

³ *Baker v. Baker*, 55 Tex. 578.

legal effect. Such would be the effect of the deed if the purchase money became by the gift of W. C. Baker either the separate property of his son or his son's wife. But if the money was a gift to the community, it was the intention of the donor, and we think of the husband and parties to the transaction, that the deed should be taken in the wife's name, for the purpose of vesting its title in her instead of in the community, it being thought by all concerned, at the time, that by so doing, their land was best secured for the benefit of the family. It is to be noted that the effect of the deed depends on the intention, at the time the deed was executed, of him or them who had the right to control it, and that, in arriving at the intention, the cotemporaneous circumstances and declarations are evidence of the most satisfactory nature. The deed being thus taken in the name of the wife in pursuance of the common understanding to that effect of all the parties interested in the transaction, the circumstances showing that the intention was thereby to vest the title in her, our opinion is that, as between her and her husband and all parties *with notice*, it operated to convey the property to her in her separate right."¹

When property is conveyed to the wife during coverture, and by the terms of the deed, is conveyed to her "for her sole and separate use," it becomes her separate property, even though the consideration of the conveyance is community property or the separate property of the husband. The presumption that it is community property does not exist in such a case. There is no necessity for any parol testimony

¹ *Higgins v. Johnson*, 20 Tex. 395; *Peters v. Clements*, 46 Tex. 125; *Smith v. Strahan*, 16 Tex. 325; *Dunham v. Chatham*, 21 Tex. 231.

to show that it was intended as a gift to the wife. The intention that the property should be the separate property of the wife is stamped upon the face of the deed, and all the world has notice of the fact.¹

But when the *husband* intends to relinquish his right in the community property, and transfer it to his wife, his act must be explicit and such as to leave no doubt of his intentions. A mere transfer to a stranger, with directions to reconvey to the wife, will not accomplish the object, and show that a gift was intended. In such a case, the conveyance, though made in the name of the wife, cannot deprive the community of its rights.²

To constitute the wife, claiming under a conveyance from her husband, an innocent purchaser, there being an older unrecorded deed, she must have paid for the land out of her separate property. If the consideration of the deed to her was community property, such a deed would make the conveyance a gift from her husband, and no valuable consideration having moved from her, she could not therefore be an innocent purchaser. It was held when a husband made a deed to his wife to certain land, the consideration being money due her for services as a school teacher and collected by the husband two years after marriage, that such a conveyance could operate only as a gift, as it was presumed that this money so collected, was community property, and was therefore invalid as against a prior unrecorded deed of the husband to another party. It was also

¹ *Kirk v. Navigation Co.* 49 Tex. 215; *Morrison v. Clark*, 55 Tex. 443.

² *Parker v. Chance*, 11 Tex. 518; *Smith v. Strahan*, 16 Tex. 314; *Higgins v. Johnson*, 20 Tex. 389; *Rice v. Rice*, 21 Tex. 66; *Story v. Marshall*, 24 Tex. 307; *Smith v. Boquet*, 27 Tex. 513; *Johnson v. Burford*, 39 Tex. 249.

held that the fact that, as between themselves, the husband regarded this money as the wife's separate property, did not affect its character as to the other parties.¹

It may be laid down as a rule that when the husband purchases real property with his separate or with community funds, and takes the title in the name of the wife, the presumption, *as between themselves and all others not claiming as innocent purchasers*, will be that the property was intended for her and not for himself or the community.²

In *Higgins v. Johnson* the court said: "The presumption that the deed to the *husband* is a conveyance to the community is, under ordinary circumstances, *much more strong* than when the deed is to the *wife*. Conveyances are rarely taken by the husband in the joint name of himself and wife, or in her name alone; and therefore, when made in the name of the *wife*, by the direction of the husband, the presumption that the property belongs to the common gains has not the force attached to it as when arising upon a deed to the *husband*, *in his own name*."

Husband and wife may make verbal sales and gifts to each other, and may also make verbal exchanges with each other. Such transactions ought not to be admitted, unless on clear and satisfactory proof that the property was divested out of the vendor or donor, and vested in the vendee or donee. There must be the strictest proof that such transactions are *bona fide*. No evidence should be kept from the jury that would tend to throw any light on the intentions of the parties, and even a

¹ *Pearce v. Jackson*, 61 Tex. 642.

² *Higgins v. Johnson*, 20 Tex. 389; *Smith v. Boquet*, 27 Tex. 507; *Hatchett v. Conner*, 30 Tex. 104.

statement in the last will of either would be received as a circumstance in regard to such intention.¹

The *prima facie* presumption arising from a deed of the husband to the wife of community (*real*) property is that it was intended to change its character from community property to the separate property of the wife, and that the deed is effectual against a subsequent purchaser.² Such a rule, applicable to real estate and solemn assurances of title, can not appropriately be applied to the rights of husband and wife growing out of verbal sales, exchanges, or gifts of *personal* property, *especially* where the latter *consists* of money. Such transactions between husband and wife will be subjected to the most rigid scrutiny, and they will not be sustained unless upon the clearest proof of their validity. It is of the essential quality of such a gift that the intention and purpose to make it should be well defined.³ In *Wellborn v. O. F. B. and E. Co.*, 56 Tex. 504, it was accordingly held that "the mere deposit of money in a bank by the husband, to the account and credit of his wife, can not of itself be deemed a circumstance sufficiently explicit as to determine conclusively that such act was intended as a gift of the money as her separate property, and that it would have the effect as to third persons to alter its character as community into that of separate property."

§ 35. Management and control of the community property.—The husband has the management and control of the community property, with the like absolute power of

¹ *Bradshaw v. Mayfield*, 18 Tex. 21; *Coats v. Elliott*, 23 Tex. 613; *Barziza v. Graves*, 25 Tex. 324; *Kendrick v. Taylor*, 27 Tex. 698.

² *Smith v. Strahan*, 16 Tex. 314.

³ *Kendrick v. Taylor*, 27 Tex. 695; *Bradshaw v. Mayfield*, 18 Tex. 21; *Wellborn v. O. F. B. and E. Co.*, 56 Tex. 504.

disposition (other than testamentary) as he has of his separate estate.¹

In Texas the courts say: "The titles of the husband and wife to the community property are equal, the only difference being, that during the continuation of the married relation, the husband, as the head of the family, has the management, control, and disposition of this property for their joint benefit."²

"The relation of husband and wife toward the community property is that of a partnership. The business of the firm is transacted in the name of the husband, and he prosecutes and defends its suits with the same effect as if his partner were named in the case. Judgments in such suits bind both partners, or accrue to their joint benefit if in their favor. In fact, the wife is as much a party as if the record recited that the husband instituted or defended the suit for the use and benefit of himself and wife. Having all the attributes of a party, she must be treated as such, and must be excluded from testifying whenever her husband and partner could not be admitted to the witness stand."³ A judgment against him alone in regard to the community

¹ Hittell's General Laws (Cal.), 3571; Civil Code (Cal.), § 172; Rev. Stats. (Tex.), 2852.

Nevada.—Compiled Laws, 156. The husband is, for the purpose of bringing suits upon choses in action which are common property, and so far as the disposition of such property is concerned, the sole owner, and he alone is the proper party to bring actions upon them. It is not necessary to make the wife a party to such an action. The power of management and absolute disposition of the common property clothes the husband with such ownership and authority as to warrant the allegation that he is the owner of a chose in action which is common property. (*Crow v. Van Sickle*, 6 Nev. 146.)

² *Wright v. Hays*, 10 Tex. 130; *Yance v. Battie*, 48 Tex. 46; *Johnson v. Harrison*, 48 Tex. 257; *Zimpelman v. Robb*, 53 Tex. 282.

³ *Simpson v. Brotherton*, 3 Tex. Law Reporter, 240.

property is conclusive as to the title to such property, both upon him and his wife.¹ A conveyance or mortgage of the community property by the husband alone is valid, and this, even though the property stands of record in the name of the wife, as the consent of the wife is not necessary. The law, in vesting in the husband the absolute power of disposition of the community property as of his separate estate, designed to facilitate its *bona fide* alienation, and to prevent clogs upon its transfer by claims of the wife.² He can collect, without her consent, a note made payable to her, if it is the property of the community,³ her endorsement alone not being sufficient.⁴ The wife can not convey the community property without the concurrence of her husband.⁵ Her deed to such property is valid, however, if made with his assent, express or implied. If he was present simply at the bargain, but not at the execution of the deed, it would not be valid. If he receives and retains the purchase money, her conveyance of the community property would be binding.⁶

§ 36. Power of the husband to dispose of the community property in fraud of the rights of the wife.—The husband, though he is the active partner of the firm, having the sole power to dispose of the common stock and gains, can not do so for the purpose of defrauding or preju-

¹ *Jergens v. Schiele*, 61 Tex. 255.

² *Estate of Tompkins*, 12 Cal. 124; *Smith v. Smith*, 12 Cal. 225; *Van Maeren v. Johanson*, 15 Cal. 312; *Packard v. Arellanes*, 17 Cal. 538; *Fuller v. Ferguson*, 26 Cal. 567; *Bernal v. Gleim*, 33 Cal. 668; *Brewer v. Wall*, 23 Tex. 585; *Mabry v. Harrison*, 44 Tex. 287; *Poe v. Brownrigg*, 55 Tex. 133.

³ *Wells v. Cookrum*, 13 Tex. 128.

⁴ *Hemmingway v. Mathews*, 10 Tex. 207.

⁵ *Young v. Van Benthuyzen*, 30 Tex. 762.

⁶ *Thomas v. Chance*, 11 Tex. 637.

dicing the rights of the wife. A gift of a portion of the common property to a stranger is not void *per se*, but excessive or capricious donations and sales made with the intent to defraud the wife are void.¹ He may, while free from debts, make a gift to his wife of a portion or the whole of the common property, to hold as her separate property.² If he should attempt, however, to dispose of the community property so as to defraud the wife, a very serious question arises, how is she to prevent it or to obtain redress?

Texas.—In Texas it has been held that the wife is entitled, in such a case, to have her action against the property of the husband and against the person³ to whom it was transferred. She is amply protected by statute, in Texas, against any attempts of the husband to defraud her of her rights in the community property, pending divorce proceedings.

When she sues for a divorce, she may sequester their common or her separate property, upon making oath that she fears her husband will waste her separate or their common property, or the fruits or revenue produced by either, or that he will sell or otherwise dispose of the same so as to defraud her of her just right, or that he will remove the same out of the limits of the county during the pendency of the suit.⁴

On and after the day on which the action for divorce

¹ *Panaud v. Jones*, 1 Cal. 514; *Smith v. Smith*, 12 Cal. 225; *Fuller v. Ferguson*, 26 Cal. 567; *De Godey v. Godey*, 39 Cal. 164; *Lord v. Hough*, 43 Cal. 581; *Wright v. Hays*, 10 Tex. 133; *Scott v. Maynard*, Dallam, 548; *Stramler v. Coe*, 15 Tex. 215.

² *Barker v. Koneman*, 13 Cal. 10; *Kohner v. Ashenauer*, 17 Cal. 582; *Peck v. Brummagin*, 31 Cal. 447; *Woods v. Whitney*, 42 Cal. 361; *Higgins v. Johnson*, 20 Tex. 389.

³ *Stramler v. Coe*, 15 Tex. 215.

⁴ *Rev. Stats.* 4489; *Pasch. Dig.* 5095a.

is brought, it is not lawful for the husband to contract any debts on account of the community, nor to dispose of the land belonging to the same; and any alienation made by him after that time is null and void, if it be proved to the court that such alienation was made with a fraudulent view of injuring the rights of the wife.¹

“The language of the law clearly vests the prohibition to alienate on the *fraudulent intent* with which it was made, and throws the burthen of proof of such fraudulent intent on the party impeaching its fairness. The general power given to the husband to manage and control the community property, would authorize an alienation thereof, provided it was not with an intent to defraud the wife. If the husband, without any fraudulent intent to defeat the rights of the wife, was about to dispose of the community property, the wife could protect herself by an *injunction*. This is provided for by statute; but it would nevertheless have been equally available to the party, without the statutory provision, under the general equity jurisdiction of our own District Courts.”²

At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and appraisement to be made of both the real and personal estate which are in the possession of the husband, and an injunction restraining him from disposing of any part thereof in any manner.³

Pending any suit for divorce the court or the judge thereof may make such temporary orders respecting the

¹ Rev. Stats. 2867; Pasch. Dig. 3457; Hart. Dig. 855.

² Hagerty v. Harwell, 16 Tex. 665.

³ Rev. Stats. 2869; Pasch. Dig. 3458.

property and parties as are deemed necessary and equitable.¹

The statute provides that "in all suits and proceedings for divorce from the bonds of matrimony the defendant shall not be compelled to answer upon oath."² This provision has reference only to the primary object of the suit, viz.: the dissolution of the matrimonial relation. All statements relative to the property of the parties, and upon which the restraining order of the court is to be governed, should be verified by the affidavit of the party seeking such interposition of the judicial authority.³

In regard to the *facts* which should be stated as grounds of the application for an injunction, the following from the opinion in *Wright v. Wright* is in point: "In this petition, none of the usual averments upon which such applications in ordinary suits are founded are made, and it is insisted that the petition should have set forth that the defendant was destroying or wasting, or about to remove or sell the property, or some other facts which would show that the property was in imminent danger of being destroyed—under certain circumstances, such allegations would seem unnecessary. The object of the suit is a total disruption of the matrimonial connection, and, during the progress of the cause, the wife would have the right to such orders and writs as would secure the preservation of her *separate property*, all of which is by law placed under the management and in the possession of the husband. The legal power of disposition of this prop-

¹ Rev. Stats. 2869; Pasch. Dig. 3454.

² Rev. Stats. 2863; Pasch. Dig. 3452.

³ *Wright v. Wright*, 3 Tex. 176.

erty is not in the husband, and, consequently, an inhibition of the exercise of such power could not operate injuriously or oppressively upon his right, and the writ would be granted on satisfying the court that such property is in possession of the husband.

"The wife has an equal interest in the *community* property, and the husband is forbidden by statute from contracting, after the commencement of the suit, any debts on the account of such property—and all alienations in fraud of the wife's rights are declared to be null and void, and this court, on slight showing, will issue its injunction for the conservation of this property which the husband is forbidden to incumber with debts, and whose alienations of which in fraud of the wife are declared to be null and void.

"When the property in the possession of the husband is *exclusively his own*, but upon which the wife may have legal claims or incumbrances, she would be entitled to an injunction upon the averment of her apprehensions, on some reasonable grounds, that the property would be so disposed of as to render a judgment fruitless if obtained in her favor."

California.—In California there seems to be no certain, well-defined mode of preventing such action on the part of the husband. The pendency of proceedings for a divorce does not, of itself, interrupt the husband's powers over the community property. It does not come into the custody of the court by the institution of the suit. The husband has still the control and full power of disposition of it.¹ *Griener v. Griener* is the latest

¹ *Lord v. Hough*, 43 Cal. 585; *Griener v. Greiner*, 58 Cal. 115; *De Godey v. Godey*, 39 Cal. 162.

decision upon this matter. In this case the wife attempted to obtain an injunction restraining the husband from carrying out an alleged threatened fraudulent transfer of the community property, with intent to injure her, and the court said: "If the transfer has been made to defraud the community, on the dissolution of the community the wife can bring her action to vacate it. *We do not see that she can bring any action to set aside any transfer made by the husband while the marriage bond exists.* Until this is dissolved, . . . she has no interest in the common property which entitles her to sue. As this is so, the lapse of time will be no bar to such action brought by her on the dissolution of the community. . . . It may be that the interest of the wife is sufficient, while the coverture exists, on a complaint properly framed of the character of a bill *quia timet*, to procure an injunction to restrain the husband from carrying out a threatened fraudulent transfer of such property which would result in loss to her, or to compel the fraudulent donee or grantee of such property with notice of the fraudulent intent to give security to satisfy any claim which she may be found to have to it on the settlement of the affairs of the community when the marriage tie has been dissolved. Probably such an action would be maintainable by the wife."

These views were endorsed by only two out of four justices, the judgment being concurred in on other grounds. They are not in harmony with the previous decisions of the court¹ (*Smith v. Smith*, *Fuller v. Ferguson*, and *Lord v. Hough*), nor with the accepted theory

¹ *Smith v. Smith*, 12 Cal. 225; *Lord v. Hough*, 43 Cal. 585; *Fuller v. Ferguson*, 26 Cal. 567.

concerning community property. This theory is best expressed in the language of Justice Myrick in this same case (dissenting opinion): "His right to manage and dispose of the community property must be exercised in endeavors to preserve or use it for their common benefit, not to give it away."

§ 37. Management and control of the community property during the absence of the husband.—*Texas*.—The wife has also dominion in the community property, but during the life of the husband it is not *in actu*, but *in habitu*. It is passive.¹ Her rights therein are equal to his, but they are passive while his are active. But when he abandons the administration of the common property, when he ceases the discharge of his duties, deserts his wife, and reduces her to the necessity of supporting the family, her passive rights become active, and his cease. She can then alone dispose of and manage the common property.²

In *Zimpelman v. Robb* the court said: "Under such circumstances the court should not 'weigh in golden scales' the discretion given to the wife in the disposition of the community property for the support of herself and family, and this discretion will not be reviewed, unless, perhaps, in a case where it has been used as a fraud upon the rights of the husband."

The period of abandonment is not material, except, in evidence, to show that the absence is not temporary in its nature, but a complete desertion. When the wife, by reason of the husband's abandonment, has the power

¹ *Higgins v. Johnson*, 20 Tex. 389.

² *Wright v. Hays*, 10 Tex. 133; *Cheek v. Bellows*, 17 Tex. 617; *Zimpelman v. Robb*, 53 Tex. 281.

to sell the community property, she acts as an unmarried and *not* as a married woman, and executes her contracts and instruments as a *feme sole*.¹

The same rule applies when a husband becomes insane.² A long and necessary absence in the army would not, however, confer on her this power.³ This applies also to her separate estate.⁴ The effect of this right of the wife is very tersely expressed in *Zimpelman v. Robb*: "The legal effect of the deed to the husband alone to community property, is to make it a deed to the community itself; and, as the wife, in the event of desertion by the husband, has the power, in certain contingencies, to sell community property, a subsequent purchaser from the husband must, at his peril, take notice of a prior recorded deed from the wife."

California.—In California the wife acquires no such power by reason of the husband's desertion. She must seek the courts for a divorce and a division of the property.

§ 38. The wife's interest in the community property during the existence of the community.—*California*.—The wife, under the Mexican law, was clothed with the revocable and *feigned* dominion and possession of one-half of the property acquired by her and her husband during the coverture.⁵ During this period the husband is the head of the community, and the law invests him with discretionary power in all matters pertaining to its

¹ *Wright v. Hays*, 10 Tex. 133; *Cheek v. Bellows*, 17 Tex. 616; *Fullerton v. Doyle*, 18 Tex. 12; *Ann Berta Lodge v. Levertton*, 42 Tex. 20.

² *Forbes v. Moore*, 32 Tex. 199.

³ *Carothers v. McNese*, 43 Tex. 224.

⁴ *Davis v. Saladee*, 57 Tex. 326.

⁵ *Ante*; *Panaud v. Jones*, 1 Cal. 515.

business or property. In fact, its business is conducted and its property acquired in his name, and his authority in the administration of its affairs is exclusive and absolute.¹ The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true the wife is a member of the community, and is entitled to an equal share of the acquests and gains, "*but*" not so long as the community exists; her interest is a mere expectancy, like that which an heir possesses in the estate of an ancestor, and possesses none of the attributes of an estate, either at law or equity.² Yet, while this is so, the interest of the wife is so vested in her that the husband can not deprive her of it by will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it.³

- *Texas*.—In Texas the interest of the wife in the community property during the marriage is better defined than in California. It is more than an expectancy. It is a present, subsisting interest, co-equal with the husband's, but subject to his right of control and disposition. It is not a mere expectancy, because it is not dependent upon the survivorship of the wife, as in California. This will be shown in the succeeding sections.

§ 39. The wife's interest in the community property upon the dissolution of the community.—*California*.—(1) *By the death*

¹ *Ante*.

² *Van Maren v. Johnson*, 15 Cal. 311; *Packard v. Arellanes*, 17 Cal. 538; *Greiner v. Greiner*, 58 Cal. 115.

³ *Ante*, § 36; *De Godey v. Godey*, 39 Cal. 164.

of the husband.—Section 11 of the Act of 1850 provided that, upon the dissolution of the community by the death of either husband or wife, one-half of the common property should go to the survivor, and the other half to the descendants of the deceased husband or wife, or if there were no such descendants, the whole went to the survivor, subject, in either case, to the payment of the debts of the deceased.¹

This is a deviation from the Spanish law, unless the words “debts of the deceased” shall be construed as including all debts contracted for the community, whether by the deceased or the survivor.²

In order to entitle the surviving wife to the whole of the common property, subject to the payment of debts, it had to be *affirmatively* shown that there were no descendants of the deceased.³

The term “descendants” here means “children, grandchildren and their children, to the remotest degree.”⁴

In 1861 this was amended so that on the death of the husband, there being no descendants of the husband, one-half was subject to his testamentary disposition, or, in the absence of such disposition, was distributed as his separate estate, while the other half became the property of the wife. If there were such descendants, they obtained one-half of the common property, and the wife obtained the other half. In both cases it was subject to the payment of his debts. By this amendment the

¹ Stats. 1850-3, p. 814; *Estate of Tompkins*, 12 Cal. 124; *Packard v. Arelanes*, 17 Cal. 537, 538; *Hart v. Robertson*, 21 Cal. 348; *Morrison v. Bowman*, 29 Cal. 337; *Harp v. Calahan*, 46 Cal. 234.

² *Panaud v. Jones*, 1 Cal. 514.

³ *Cummings v. Chevrier*, 10 Cal. 519.

⁴ *Jewell v. Jewell*, 28 Cal. 232.

wife was limited to her half, whether or not the husband left descendants.¹

In 1864, this was again amended, so as to read: "Upon the dissolution of the community by the death of the husband, one-half of the common property shall go to the surviving wife, and the other half shall be subject to the testamentary disposition of the husband, and in the absence of such disposition, shall go to his descendants, equally, if such descendants are in the same degree of kindred to the intestate, otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, shall be subject to distribution in the same manner as the separate property of the husband; provided, that in case of the dissolution of the community by the death of the husband, the entire common property shall be equally subject to his debts, the family allowance, and the charges and expenses of administration."²

This same provision was enacted in the Code.³

¹ Stats. 1861, p. 310; *Jewell v. Jewell*, 28 Cal. 232.

² Stats. 1863-4, p. 363.

³ Hittell's General Laws, 3573; Civil Code, § 1402; *Nevada*—Compiled Laws, 160. Section 160, Compiled Laws, in 1883 was amended to read as follows: "Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his surviving children equally, and in the absence of both such children and disposition, the entire community property belongs without administration to the surviving wife except as hereinafter provided; subject, however, to all debts contracted by the husband during his life that were not barred at the time of his death; provided, however, that the homestead set apart by the husband and wife, or either of them, before his death, and such other property as may be exempt by law from execution or forced sale, should be set apart for the use of the widow and minor heirs, and if no minor heirs, for the use of the widow. In case of dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance,

(2) *By the death of the wife.*—Under the Act of 1850, upon the dissolution of the community by the death of the wife, her descendants succeeded to the interest to which she would otherwise be entitled, not as a part of her estate, but because it was vested in them by statute. They took it, however, liable to be absorbed in the payment of debts. Upon her death the husband held as surviving partner, first, to pay the debts, and second, as trustee for her descendants.¹

In *Cook v. Norman* the court held that a purchaser in good faith from the husband after the death of the wife, was not bound to show, in order to support his title against a child of the community, that the sale of the premises conveyed to him was, in point of fact, necessary to provide for the payment of the community debts.

In 1861 the law was amended so that on the death of the wife the husband obtained *all* of the community property, the amendment reading as follows: "Upon the dissolution of the community by the death of the wife, the entire common property shall go to the surviving husband."²

In 1864 it was again amended so as to insert the

and charges and expenses of administration; provided, however, that if in the absence of said testamentary disposition, the surviving wife and children, and in the absence of such children the wife shall pay or cause to be paid all indebtedness legally due from said estate, or secure the payment of the same, to the satisfaction of the creditors of said estate, then and in that case the said community property shall not be subject to administration. Stats. 1883, p. 16.

¹ *Packard v. Arellanes*, 17 Cal. 541; *Ord v. De la Guerra*, 18 Cal. 74; *Broad v. Broad*, 40 Cal. 496; *Broad v. Murray*, 44 Cal. 228; *Johnston v. Bush*, 49 Cal. 198; *Cook v. Norman*, 50 Cal. 638; *Johnston v. S. F. S. U.*, 63 Cal. 554.

² Stats. 1861, p. 310.

words "*without administration*," the amendment reading as follows: "Upon the dissolution of the community by the death of the wife, the entire common property shall, *without administration*, go to the surviving husband."¹

The Code is very much the same as the amendment of 1864, and reads as follows: "Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband."²

Texas.—The interests and rights of husband and wife in the community property are *equal*.

(1) *If there are no children surviving*.—(a) The Act of 1848 provided that the community property went to the survivor, subject to the payment of all the debts of the husband, and the debts of the wife contracted

¹ Hittell's General Laws, 3573.

² Civil Code, § 1401; *Moore v. Jones*, 63 Cal. 12.

Nevada.—Compiled Laws, 160. "Upon the death of the wife the entire community property belongs, without administration, to the surviving husband, except that in case the husband shall have abandoned his wife and lived separate and apart from her without such cause as would have entitled him to a divorce, the half of the community property, subject to the payment of its equal share of the debts chargeable to the estate owned in community by the husband and wife, is at her testamentary disposition in the same manner as her separate property, and in the absence of such disposition goes to her descendants equally, if such descendants are in the same degree of kindred to the decedent; otherwise according to the right of representation; and in the absence of both such disposition and such descendants, goes to her other heirs-at-law, exclusive of her husband."

during the marriage for necessities.¹ Letters of administration were first issued as in other estates.²

(b) The Act of 1856 provided that it was not necessary for any surviving husband or wife to administer upon the community property, but he or she had the exclusive management, control, and disposition of the same, in the same manner as the husband had during the lifetime of the wife. Upon the marriage of the wife her powers over the community property ceased, and it became subject to administration like other estates.³

(c) The Revised Statutes of 1879 provide that, "where the husband or wife dies *intestate, leaving no child or children and no separate property*, the common property passes to the survivor charged with the debts of the community, and no administration thereon is required."⁴ From these statutes we deduce the rule that, where there are *no* surviving children, the surviving husband or wife takes the entire community estate, subject of course to the payment of all the debts with which it is chargeable, but without administration.⁵

(2) *If there are children surviving.*—(a) The Act of 1848 provided that, if there were children surviving, the survivor was entitled to one-half of the community property, and the other half passed to said children.⁶ Letters of administration were first issued as in other cases.⁷

¹ Pasch. Dig. 4642.

² Hart. Dig. 1211.

³ Pasch. Dig. 4646, 4652.

⁴ Rev. Stats. 2164, 1653.

⁵ Wall v. Clark, 19 Tex. 324; Sossaman v. Powell, 21 Tex. 666; Johnson v. Harrison, 48 Tex. 267.

⁶ Pasch. Dig. 4642.

⁷ Hart. Dig. 1211.

(b) The Act of 1856 provided that, if there were children surviving, it was the duty of the survivor to file in the County Court a full, fair, and complete inventory and appraisement of all the community property, to be taken and recorded as in cases of administration, and to have the same form and effect in all suits between parties claiming under it. After which, *without any administration or further action in the Probate Court*, the survivor has the right to manage, control, and dispose of said community property in such manner as might seem best for the interests of the estate, and to sue and be sued with regard to the same in the same manner as the husband could during the life of the wife. The survivor had to keep a fair and full account of all his or her doings, and, upon final petition, render the same to the legal heirs of the deceased wife or husband.

If said inventory and appraisement were not filed within sixty days after the death of the wife or husband, the court could require them to be filed, or grant administration as in other cases. The court could require a bond to be filed, in an amount and with such conditions as might be deemed necessary, whenever such was required for the protection of the estate. Upon a failure to file such bond, administration could be granted as in other cases.

The survivor might, as each or all of the surviving heirs of the deceased wife or husband became of lawful age, set aside and deliver to such heirs what he or she considered their equal and equitable share of said community estate, exhibiting therewith a full and complete statement of the amount, description, and value of the same. This partition and distribution was binding

unless proceedings were taken in two years thereafter to set it aside, when the court might require a full investigation and make all orders and decrees necessary to effect a fair partition and distribution.

If the surviving wife married again, her powers ceased, and administration might be granted as in other cases.¹

(c) The Act of 1876 provided that, upon the death of the husband or wife, administration of the community property was unnecessary. The survivor continued to have the same power of disposition over the community property which the husband possessed during the life of the wife; but he or she was required to file an inventory and appraisement of all such property, and to file a bond in an amount equal to the value of the whole community property, and conditioned to faithfully administer the same, and pay over one-half of the surplus, after payment of the debts with which it was properly chargeable, to the persons entitled to receive it. The survivor could be called to account at any time after one year from the filing of the bond, which was suable and recoverable, and in every other respect like an administrator's bond.

There was the same provision as in the Act of 1856 regarding the marriage of the surviving wife.²

(d) The Revised Statutes of 1870 provide that where the husband or wife dies *leaving a child or children*, the survivor shall have the exclusive management, control, and disposition of the community property, in the same manner as the husband has during the lifetime of the wife. Upon the marriage of the wife she ceases to have such control and management of the

¹ Pasch. Dig. 4648-4652.

² Stats. 1876, p. 124.

community estate or the right to dispose of the same, and it becomes subject to administration as in other cases of deceased persons' estates.¹

The survivor must, within four years after the death of the other partner, file a written application in the County Court of the proper county, asking for the appointment of appraisers to appraise the estate, stating the time and place of said death, the name, age, and residence of the child or children, that there is a community estate, and other jurisdictional facts. The County Court, without citation, may, by an order entered on the minutes of the court, appoint appraisers. The survivor, with these appraisers, shall, within twenty days from the date of said order, subscribe, swear to, and file in said court, a full, fair, and complete inventory and appraisement of the community estate, and a list of all community debts due the estate. The survivor shall also file, at the same time, a bond in a sum equal to the whole of the value of such community estate, conditioned that he or she will faithfully administer such estate, and pay over *one-half* of the surplus thereof, after the payment of debts with which the whole of such property is properly chargeable, to such person or persons as shall be entitled to receive the same. When the inventory, appraisement, list of claims, and bond are approved, they shall be recorded upon the minutes of the court, and the order approving the same, shall be the authority of the survivor, without any further action in the court, to control, manage, dispose of such estate as may seem best for the interests thereof, and to sue and be sued with regard to the same. The

¹ Rev. Stats. 2166, 2181, 2182.

survivor shall keep full accounts, and on final partition, account to the legal heirs of the deceased.¹

The same steps are to be taken in paying debts, making a new appraisement, and giving a new bond, as in other administrations. Any creditor whose claim has not been paid in full, may, within one year after the filing of said inventory, etc., cite the survivor to render a full account of his administration. If the court finds that the estate has been improperly administered, or that there are assets liable for the payment of such claims, and said claim is for one thousand dollars or less, exclusive of interest, it shall cite the sureties on said bond to show cause before said court, why judgment should not be rendered against them for such debts and costs. If said claim is for more than one thousand dollars, the court shall order the survivor to pay it, and should he neglect to do so for thirty days, the creditor has his action upon said bond.

It will be noticed that the inventory and appraisement must be returned to the county judge and approved by him before the survivor has the authority to manage and dispose of the deceased partner's interest in the common property. This amendment removes the uncertainty that before existed on this point. After the lapse of twelve months from the filing of such bond, the persons entitled to the deceased's share of such community property shall be entitled to demand and have a partition and distribution thereof as in other administrations.²

Partition of the community property may also be ob-

¹ *Henderson v. Riley*, Tex. Court of Appeals (Civil Cases), § 484.

² Rev. Stats. 2166-2183.

tained as follows: "When any husband or wife shall die, leaving any common property, the survivor may, at any time after letters testamentary or of administration have been granted, and an inventory, appraisement, and list of claims of the estate have been returned, make application in writing to the court which granted such letters for a partition of the common property, which application shall be acted on at a regular term of the court.

"If upon the hearing of such application there appear to be any such common property, and such surviving husband or wife shall execute and deliver to the county judge an obligation with two or more good and sufficient sureties, payable to and approved by said county judge, for an amount equal to the value of his or her interest in such common property, conditioned for the payment of *one-half* of all debts existing against such common property, then the county judge shall proceed to make a partition of said common property into *two equal moieties*, one to be delivered to the survivor, and the other to the executor or administrator of the deceased, and all the provisions of the law relating to partition and distribution of the estate of decedents apply to any such partition of common property so far as they are applicable. Whenever any such partition shall be made, a lien shall exist upon the property delivered to the survivor, to secure the payment of the aforesaid obligation, and such obligation shall be filed with the clerk and recorded in the minutes of the court, and any creditor of such common property may sue in his own name on such obligation, and shall have judgment thereon for *one half* of such debt as he may establish, and for *the other half* he shall be entitled to be paid by the executor or adminis-

trator of the deceased. Until any such partition of common property is applied for and made as herein provided, the executor or administrator of the deceased shall have the right, and it shall be his duty, to recover possession of all such common property, and hold the same in trust for the benefit of the creditors and others entitled thereto under the provisions of this law."¹

From these statutes we deduce the following rules, viz.:

(1) Where there are children surviving, one-half of the community property goes to the survivor, and one-half descends to the children of the deceased husband or wife. The interests of the survivor and of the children are the same.²

(2) The community interest of a married woman, dying intestate, descends alike to all her children, whether by the same or by several husbands.³

(3) The interest of the wife in the community property descends to and vests in her children immediately at her death.⁴

(4) It is only, however, the residue, after the payment of all debts with which the community estate is charged, that vests in the survivor and the children.⁵

¹ Rev. Stats. 2128-2131; Stats. 1876, p. 122.

² *Morrill v. Hopkins*, 36 Tex. 687; *Johnson v. Harrison*, 48 Tex. 268; Rev. Stats. 1853.

³ *Morrill v. Hopkins*, 36 Tex. 688.

⁴ *Cannon v. Murphy*, 31 Tex. 405; *Collins v. Box*, 40 Tex. 193; *Gilliam v. Nutt*, 58 Tex. 303; *Carter v. Wise*, 39 Tex. 275; *Tiemann v. Robeson*, 52 Tex. 415; *Rudd v. Johnson*, 60 Tex. 91; *Holland v. Seward*, Tex. Court of Appeals (Civil Cases), § 944.

⁵ Rev. Stats. 1854; *Jones v. Jones*, 15 Tex. 147; *Stramler v. Coe*, 15 Tex. 215; *Primm v. Barton*, 18 Tex. 224; *Cooper v. Singleton*, 19 Tex. 267; *Mitchell v. De Witt*, 20 Tex. 299; *Brackett v. Devine*, 25 Tex. (Supp.) 196; *Tucker v. Brackett*, 28 Tex. 339; *Burleson v. Burleson*, 28 Tex. 418; *Walker*

Until these debts are paid, the heirs of the wife or husband have no real interest in the community property.¹

The heirs have no more rights than the wife, whose estate they inherit, had during the marriage. It is not necessary to make her a party defendant to an action against the husband on a community debt, and it is not, therefore, necessary to make the heirs parties to such a suit, whether the same was begun but not finished before the death of the wife, or begun after her death. A judgment may be obtained in such an action against the husband alone, and it may be enforced against the community property. The purchaser of community property sold under such a judgment would take the title of both the survivor and the heirs of the deceased wife. In *Carter v. Connor*² the court said: "The interest of the surviving husband in the community property includes the entire interest till the community debts are paid. A conveyance of a personal interest of the husband in the community property after the death of his wife, carries the title both of himself and his wife's heirs, when there exists an incumbrance upon the property which is removed by the conveyance. A levy and sale of a husband's interest in community property, made under a judgment against him alone after the death of the wife, the cause of action being a community debt, conveys the interest both of the husband and the heirs of the wife."³

v. Howard, 34 Tex. 512; *Morrill v. Hopkins*, 36 Tex. 687; *Johnson v. Harrison*, 48 Tex. 268; *Magee v. Rice*, 37 Tex. 500; *Watkins v. Hall*, 57 Tex. 3; *Carter v. Connor*, 60 Tex. 52.

¹ *Soye v. McCallister*, 18 Tex. 80; *Woodley v. Adams*, 55 Tex. 531.

² *Carter v. Connor*, 60 Tex. 52; *Jergens v. Schiele*, 61 Tex. 255.

³ *Jones v. Jones*, 15 Tex. 143; *Primm v. Barton*, 18 Tex. 206; *Soye v. Maverick*, 18 Tex. 100; *Higgins v. Johnson*, 20 Tex. 389; *Brewer v. Wall*, 23

The administrator of the estate of the deceased husband has, in this regard, the right possessed by the surviving husband. He has the authority to maintain suits, to recover and to reduce to possession the whole community estate for the purpose of administration, *to the extent of paying the community debts*, without the necessity of joining with him either the heirs of the deceased wife or husband. *But he is not the representative* of the heirs of the deceased wife, to that extent that a judgment against him recovering lands belonging to the community, would constitute a bar to a suit by such heirs for the community interest of their mother. A purchaser from the administrator, upon a sale made for the above purpose, would take the title both of the deceased husband and of the heirs of the deceased wife.¹

(5) The fact of heirship and that the land was community property at the death of the parent being established, the children of the deceased parent are entitled to the share of said parent, unless some equitable defense is made out. The existence of a community obligation being shown, the burden of proof, in impeaching a conveyance made in discharge of that obligation by the surviving parent, is properly placed on the children. But the implied conclusion is, that, until such community obligation or some other equity is established, the right of the children prevails.²

(6) If the heirs of the wife have received from their father's estate property equal in value to one-half of the

Tex. 585; Allison v. Shilling, 27 Tex. 454; Tucker v. Brackett, 28 Tex. 336; Burleson v. Burleson, 28 Tex. 418; Good v. Coombs, 28 Tex. 50; Adriance v. Brooks, 13 Tex. 279; Lumpkin v. Murrell, 46 Tex. 51; Dawson v. Holt, 44 Tex. 174; Woodley v. Adams, 55 Tex. 531 (as to surviving wife).

¹ Soye v. McCallister, 18 Tex. 99; Simmons v. Blanchard, 46 Tex. 267; Murchison v. White, 54 Tex. 86; Carter v. Connor, 60 Tex. 52.

² Johnson v. Harrison, 48 Tex. 268; Wilkinson v. Wilkinson, 20 Tex. 237.

entire community property at their mother's death, this fact may be proved as a defense to a suit by them against whoever may be found in possession of any part of the community property. The burden of proof in showing such advancements is upon the defendant.¹

If, however, a purchaser from the father of the heirs holds only a quit-claim deed, the heirs need not account for assets inherited from their father.²

An instrument executed by a married woman, acknowledging an advancement from her father, need not be executed in the same manner as a conveyance of real property. The statute requiring a privy examination applies to a "deed or other writing purporting to be a conveyance," and not to such an instrument as the one above mentioned.³

The fact that advancements were made to the children during the life of the mother, out of community property, would not confer upon the father any interest in the share of the community estate which vested in the children on the death of the mother. This is equally true, whether the advancements were from the community estate of the father or mother. If, however, it is conveyed after the death of the mother, unless by sale upon consideration, they must account to their father upon partition.⁴

(7) The legal title is in the survivor and children.⁵ They hold as tenants in common, with the power in

¹ *Magee v. Rice*, 37 Tex. 500; *Collins v. Box*, 40 Tex. 197; *Conner v. Huff*, 48 Tex. 364; *French v. Strumberg*, 52 Tex. 92; *Monroe v. Leigh*, 15 Tex. 519.

² *Carter v. Wise*, 39 Tex. 273.

³ *French v. Strumberg*, 52 Tex. 109.

⁴ *Wilson v. Helms*, 59 Tex. 682.

⁵ *Johnson v. Harrison*, 48 Tex. 268.

the former to manage, control, and dispose of the entire community property in such manner as may seem best for the interests of the estate.¹

(8) The Acts of 1856, 1878, and the Revised Statutes provide that the survivor shall have the sole and same authority to manage, control, and dispose of the entire community property as the husband has during the lifetime of the wife, subject to certain provisions as to accounting, etc., hereinbefore mentioned; and yet the survivor has not, in reality, such power. The survivor has a general power to sell the community property for the purpose of paying any and every debt the community estate may owe. *This power to sell is dependent on the existence of such debts, and whoever purchases must see to it that they do exist.* The purchaser is *not* bound to see to the application of the purchase money, but he must pay such a consideration "as does not give rise to the conviction that the sale was not fairly made."²

If, however, the community property be sold for the purpose of paying community debts, or for the purpose of reimbursing the survivor for separate means used in discharge of such debts, the purchaser will be protected in his purchase. The fact that all the money received for the land may not be used by the survivor for the purpose for which the law empowers the survivor to sell, ought not to affect the title of the purchaser, when good faith and fair dealing exist upon his part.³

¹ *Primm v. Barton*, 18 Tex. 206; *Brewer v. Wall*, 23 Tex. 588; *Good v. Coombs*, 28 Tex. 49; *Walker v. Howard*, 34 Tex. 478; *McAlister v. Farley*, 39 Tex. 559; *Browder v. Clemens*, 61 Tex. 587.

² *Johnson v. Harrison*, 48 Tex. 268; *Wenar v. Stenzel*, 48 Tex. 490; *Vera-mendi v. Hutchins*, 48 Tex. 552, S. C. 56 Tex. 414; *Lang Bros. v. Moody*, 2 Tex. Law Rep. 379; *Rudd v. Johnson*, 60 Tex. 91; *Carter v. Connor*, 60 Tex. 52; *Watkins v. Hall*, 57 Tex. 2.

³ *Wilson v. Helms*, 59 Tex. 682.

A purchaser, with notice of the interest of the deceased wife, from the husband or his administrator, when the sale is not made for the purpose of paying community debts, takes the title to the husband's interest only.¹

The husband can sell or incumber his own half as he wishes, but not by metes and bounds. The purchaser becomes a tenant in common with the children, and like them, holds his interest subject to the payment of community debts.² He is, however, entitled to an immediate partition, and need not wait until the children attain their majority.³

If the husband, after the death of the wife, disposes of his interest by metes and bounds, he must remunerate the heirs of the wife for their share of the purchase money by allowing them an interest equivalent thereto in value out of his share of the tract remaining unsold.⁴

The surviving husband sold some land that was community property in order to pay the community debts. After making this conveyance he qualified as survivor of the community and then made another deed as survivor. It was held that by the first deed he disposed of his own interest, and by the second deed of the interest of his deceased wife in said community property.⁵

In *Veramendi v. Hutchins*⁶ it was held that in a suit brought over thirty years after a conveyance of the

¹ *Caruth v. Grigsby*, 57 Tex. 265.

² *Hartman v. Thomas*, 37 Tex. 92; *Magee v. Rice*, 37 Tex. 502; *Walker v. Young*, 37 Tex. 519; *Wright v. McGinty*, 37 Tex. 734.

³ *Hartman v. Thomas*, 37 Tex. 92.

⁴ *Gilliam v. Nutt*, 58 Tex. 303.

⁵ *Watkins v. Hall*, 57 Tex. 2.

⁶ *Veramendi v. Hutchins*, 48 Tex. 531, S. C. 56 Tex. 414.

community property by the husband, made after the death of the wife, the jury were warranted in presuming, from the circumstances of the case, that there were community debts or such other circumstances as authorized the husband to make the sale, but that it was error for the court to charge the jury that after the great lapse of time it was presumption of law that the husband had authority to sell.

The husband can not alienate or incumber the community interest of his deceased wife for debts contracted *after* her death, nor can such property be seized and sold under execution for debts so contracted by him, so as to defeat or extinguish the rights of her children as her heirs. At the death of their mother the title to one-half of the community estate descends to and vests in them, subject only to the *then existing* debts of the community. The purchaser of such property sold on execution for a debt contracted after the death of the wife acquires only the undivided half interest of the husband.¹

(9) Before the survivor acquires this authority to manage and control the common property, he must file an inventory, appraisal, list of claims, and bond, and obtain an order of the court vesting him with such authority. He virtually takes out letters of administration.

All that it was necessary for the survivor to do, under the Act of 1856, to qualify her or him to administer the common estate, was, in so far as real estate was concerned, to return an inventory into the Probate Court. Her (or his) power did not depend upon any

¹ Collins v. Box, 40 Tex. 193.

order of the Probate Court, nor upon the heir doing or failing to do anything except that, in the event of her or his mismanagement, the persons entitled to the estate, or creditors, could arrest the administration, unless the survivor gave bond. In the inception of such administration, neither oath nor bond was required of the survivor; her or his interest in the estate and liability for its debts being deemed a sufficient security for the proper management of the estate.¹ In the administration of this trust the survivor could, prior to the adoption of the Revised Statutes, act independently of the Probate Court. There was no power expressly vested in the Probate Court to supervise his or her action, or to compel an account.²

The inventory and appraisalment of the community property must, under the Revised Statutes, be filed before the survivor's authority over said property begins. Said statute provides that they *must* be returned and *approved*.

The survivor has power, however, without qualifying as such, to dispose of the community property for the purpose of paying the debts of the community.³

In *Lang Bros. v. Moody* the court said: "Under the repeated decisions of this court it must be held as conclusively settled, that the survivor of the marital relation, *without administration, upon the estate of the deceased member, in any of the modes expressly provided by statutes*, has power as survivor to sell the community prop-

¹ *Woodby v. Adams*, 55 Tex. 533.

² *Henderson v. Riley*, Texas Court of Appeals (Civil Cases), § 484.

³ *Rudd v. Johnson*, 60 Tex. 91; *Walker v. Abercrombie*, 61 Tex. 69; *Carter v. Connor*, 60 Tex. 52; *Lang Bros. v. Moody*, 2 Tex. Law Reporter, 378.

erty for the purpose of paying debts which are a charge upon it. . . . It has been properly held that the Act of 1856 did not withdraw such power from the survivor; but that the Act was intended to enlarge the powers of the survivor.¹

“The Act itself seems to recognize in the survivor such a power, and that its exercise will not be disturbed upon failure to comply with the Act, unless upon complaint by some one having an interest in the estate. And it would seem that when those interested in an estate, interpose no objection to the management and control of a community estate by the survivor *without the qualification under the statute*, that purchasers from the survivor, if there be community debts bearing a reasonable proportion to the value of the property sold by the survivor, ought not to be disturbed in their titles acquired in good faith; for, in the absence of such interposition, purchasers may well believe that those interested in the estate are content that the survivor shall exercise the powers which he possesses to sell property to raise means with which to discharge debts which are a charge upon such property.”

In *Rudd v. Johnson*, *supra*, the court said: “And after the death of the wife the husband may sell it (community property) for the purpose of paying these community debts. *That is the full extent of his authority over it without first qualifying as survivor in community.* Suppose that after the death of the wife suit should be brought and judgment recovered against the husband *alone* for lands belonging to the community, *when he had not qualified as survivor*, it is not believed that such

¹ *Wenar v. Stenzel*, 48 Tex. 489; *Dawson v. Holt*, 44 Tex. 178; *Cordier v. Cage*, 44 Tex. 535; *Lumpkin v. Murrell*, 46 Tex. 58.

judgment would bar a recovery by the heirs of the deceased wife for her community interest in such land."

In *Carter v. Connor*, *supra*, the court said: "The Act of 1856 in reference to the administration of the community estate by the survivor, *and all subsequent Acts on the subject*, were enabling Acts, intended to enlarge the powers of the survivor, and to give him or her the same control over the community after the death of one connubial partner as before. *So far as control for the purpose of payment of community debts is concerned, the Act was unnecessary, and has not interfered with the right already possessed by the survivor for that purpose.*"

In *Long v. Walker*,¹ it was held that the husband could, after the death of the wife, execute a deed to land for which he had given a bond for title during her life, and the consideration for which he had received, even though no inventory or appraisement had been filed.

In *Green v. Grissom*,² it was held that the fact that the surviving wife did not sign and swear to the inventory, there being no pretense of any intention to defraud the heirs of the deceased husband, or that the land was not sold for a legitimate purpose, would not invalidate her deed to the half interest of the deceased husband in the community lands.

In *Busby v. Davis*³ (a case arising under the Act of 1856), the record showed a petition by the wife for the appointment of appraisers "of the property of said estate," a document signed by the appraisers alone, purporting to be a correct inventory of the estate of the

¹ *Long v. Walker*, 47 Tex. 177.

² *Green v. Grissom*, 53 Tex. 435.

³ *Busby v. Davis*, 57 Tex. 324.

deceased husband, but no order of the court, whatever, nothing to show that the inventory was made or filed by the surviving wife as "an inventory and appraisement of all the community property of herself and her deceased husband." It was held that she had not qualified as survivor. But, mere irregularities in the mode and manner of making the inventory and appraisement will not vitiate a sale of the community property.¹

There seems to have been at first some confusion of thought in regard to this matter. In *Kirkland v. Little*² it was held that the *appraisement* was absolutely essential to entitle the survivor to manage and dispose of the interests of the deceased partner in the community property. In *Cordier v. Cage*³ it was held that it was the *inventory* and *not* the *appraisement* that was essential. These decisions are both modified by the later ones just above given and by the Revised Statutes.

"The right to sue for community property after the death of the husband is first in the administrator, if any; second, in the widow on showing compliance with community property law by filing bond and inventory; or third, by showing no administration and no need for one in absence of debts, or from lapse of time, in which cases the heirs would be allowed to sue."⁴

(10) When the community property is administered upon like other estates, application for a partition may be made by the survivor at any time after the issuance of letters testamentary or of administration and the filing of the inventory, appraisement, and list of claims,

¹ *Pratt v. Goodwin*, 61 Tex. 335.

² *Kirkland v. Little*, 41 Tex. 480.

³ *Cordier v. Cage*, 44 Tex. 535.

⁴ *Holland v. Seward*, Tex. Court of Appeals (Civil Cases), § 941.

and such partition will be made upon the filing, by said survivor, of a bond equal in amount to his or her interest, and conditioned for the payment of one-half the debts chargeable against the common property.¹

Prior to the Statutes of 1876 and the Revised Statutes, to entitle the heirs of the mother to partition as against the administrator of the survivor of the community, having charge as such of the community estate, it was incumbent on the heirs to allege facts showing that a general distribution of the estate was ready to be made, and that after making the partition sought, a sufficient amount of community assets would remain in the hands of the administrator to meet all community debts.²

When the community property is managed by the survivor, the persons entitled to the share of the deceased husband or wife are entitled to a partition after the lapse of twelve months from the filing of a bond by the survivor.³

§ 40. Testamentary power of the husband or wife over the community property.—*California*.—Prior to the Code there was no statutory provision touching this point. The wife, of course, could not dispose, by will, of the community property, as she had no interest in it as long as it was community property. She and the husband were held to be jointly seized thereof during the coverture, with a half interest therein remaining over to her at his death, subject only to the husband's disposal during their joint lives. This half interest of the wife's became *absolute* at his death, so that a disposition of his by devise, which could only attach *after* his death,

¹ Rev. Stats. 2128, 2129.

² *Hyatt v. Venters*, 41 Tex. 286.

³ Rev. Stats. 2183.

could not affect it. It was therefore held that the husband could not dispose of the wife's share of the community property by last will and testament.¹

The same provision is now contained in the Code.² It was accordingly held, when the husband made a will, devising one-half of all his property (being common property) to his wife, and the other half to certain legatees, that the wife took one-half by virtue of her right, and that the will only applied to the remaining half.³

Texas.—Neither husband nor wife can will away the interest of the other in the common property;⁴ nor can the survivor be deprived, by the will of the deceased marital partner, of the right to manage and control the community. This question arose in *Walker v. Howard*,⁵ and the court held that a wife could not, by her testament, set aside the legal right of her husband to control and sell the common property. But she can dispose of her interest in the community property by will, subject to the payment of the community debts, as effectually as any other property owned by her.⁶

§ 41. Interest of the wife in the community property on the dissolution of the community by the decree of a court of competent jurisdiction.—*California.*—The Act of 1850 provided as follows: "Upon the dissolution of the community by the decree of a court of competent jurisdiction, the

¹ *Beard v. Knox*, 5 Cal. 256; *Estate of Buchanan*, 8 Cal. 510; *Smith v. Smith*, 12 Cal. 216; *Scott v. Ward*, 13 Cal. 458; *Payne v. Payne*, 18 Cal. 291; *Morrison v. Bowman*, 29 Cal. 337; *Estate of Silvey*, 42 Cal. 211.

² Civil Code, § 172.

³ *Estate of Frey*, 52 Cal. 658.

⁴ *Cann v. Davis*, 33 Tex. 203; *Well v. Petree*, 39 Tex. 428; *Carroll v. Carroll*, 20 Tex. 731; *Yancy v. Batte*, 43 Tex. 57.

⁵ *Walker v. Howard*, 34 Tex. 510; *Woodly v. Adams*, 55 Tex. 535.

⁶ *Brown v. Pridgen*, 56 Tex. 126.

common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require."¹

In 1857 this section was amended by adding the following proviso: "Provided, that when such decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof, shall only be entitled to such portion of the common property as the court granting the decree may in its discretion, from the facts of the case, deem just and allow, and such allowance shall be subject to revision on appeal, in all respects, including the exercise of discretion by the court below."²

The Code in no way changes the law as above stated, and (omitting the provisions regarding the homestead) reads as follows: "In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property shall be divided as follows: If the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties."³ "The court, in rendering a decree of divorce, must make such order for the disposi-

¹ Hittell's General Laws, 3574; *Kashaw v. Kashaw*, 3 Cal. 312; *Dye v. Dye*, 11 Cal. 168; *Johnson v. Johnson*, 11 Cal. 200; *Gimmy v. Gimmy*, 22 Cal. 633; *Ewald v. Corbett*, 32 Cal. 493; *McLeran v. Benton*, 31 Cal. 29.

² Hittell's General Laws, 3574.

³ Civil Code, § 146; *Nevada—Compiled Laws*, 162.

tion of the community property as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division of the proceeds."¹

"The disposition of the community property as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court."²

The theory on which this right of the wife to one-half of the community property is founded is, that the common property was acquired by the joint efforts of husband and wife, and should be divided between them, unless the wife shall have forfeited her right by committing adultery or extreme cruelty, and even then, the court pronouncing the decree is authorized to apportion the property at its discretion.³

If a divorce is granted because of adultery, the court may award all the community property to the innocent party.⁴

In granting a divorce on the ground of extreme cruelty, the Supreme Court will not set aside the judgment of the court below in dividing the community property, unless there has been an abuse of discretion.⁵

In *Brown v. Brown*, *supra*, the wife was granted a divorce on the ground of extreme cruelty, and awarded one-half of the community property. The Supreme Court remanded the case with instructions to award her a larger share.

¹ Civil Code, § 147.

² *Ealinger v. Ealinger*, 47 Cal. 64; *Brown v. Brown*, 60 Cal. 580; Civil Code, § 148.

³ *Galland v. Galland*, 38 Cal. 265; *De Godey v. Godey*, 39 Cal. 164.

⁴ *Miller v. Miller*, 33 Cal. 352.

⁵ *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Brown v. Brown*, 60 Cal. 580.

The wife, in a suit for divorce, may make a party of any one claiming an interest in the community property.¹

If the decree of divorce does not direct a division of the community property, the same or another court may subsequently determine the disposition thereof.²

In an action for the division of the common property after a decree of divorce, it was at first held that a simple allegation that certain property is common property is not sufficient, but that the particular facts must be averred showing it to be such, and, accordingly, in *Dye v. Dye*,³ the court said that the wife deduced her right to bring such an action from the statute, and therefore she must bring herself strictly within the statute; that the statute referred to and embraced only property acquired in this State after the passage of said statute, by parties who had been married in this State theretofore, or who had married out of the State before that time, but who had resided in this State at the time of such acquisition; and that, therefore, a mere general averment that such was community property was not an averment of an issuable fact, but simply a conclusion of law.

In *Gimmy v. Doane*⁴ the court doubted the correctness of this decision, and said: "The rule is well settled that where a statute gives a *right of action*, where none existed before, the complaint in such case should show 'that the offense or act charged to have been committed or omitted by the defendant is within the provisions

¹ *Kashaw v. Kashaw*, 3 Cal. 312.

² *De Godey v. Godey*, 39 Cal. 157.

³ *Dye v. Dye*, 11 Cal. 163.

⁴ *Gimmy v. Doane*, 22 Cal. 635.

of the statute, and all the circumstances necessary to support the action must be alleged.' (1 Chitty's Pl. 372.) This rule applies more particularly to actions of a penal character. But we do not understand that it has been extended to statutes which apply merely to *rights of property*, regulating the rights of persons in and to property, and which do not relate to *remedies* for injuries, or upon contracts. The statute which prescribes what shall be *common property*, as between husband and wife, and how that common property shall be disposed of in case of a divorce between them, is a mere regulation of a right of property, and cannot properly be said to provide a new right of action. It does not, therefore, properly come within the rule invoked by the appellants, and the correctness of the decision in *Dye v. Dye*, so far as it relies upon this rule, may well be doubted."

Texas.—Since 1841 the law in regard to the distribution of the community property upon the dissolution of the marriage by divorce has been substantially the same.

The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to real estate;¹ but the discretion of the court in dividing the property must not be oppressive.²

¹ Hartley's Dig. 849; Pasch. Dig. 3452; Rev. Stats. 2864.

² *Fitts v. Fitts*, 14 Tex. 443; *Simons v. Simons*, 23 Tex. 347.

In *Craig v. Craig*,¹ the court divided the community property into two equal moieties, and gave one-half to the wife and the other half to their only child. It was held error to divest the husband of all his interest in the community property.

The use of property can be decreed to the use of the children, reserving the fee of the same in the husband.² If a wife, after a decree of divorce in her favor has been rendered, does not receive her one-half undivided interest in the whole community estate which existed when the divorce suit was brought, she has a right to satisfaction for such portion of her interest as she did not get in kind out of the balance of the mass of the community property, and this as against a purchaser with notice pending the suit.³

When a divorce is decreed, it is a dissolution of the marital rights in relation to the community property, and the *wife, although degraded*, is entitled to *her share* of such property and to her separate property, if any she had.⁴ A different view seems to have obtained in a later case, where the court said: "The absence of the wife merely will not forfeit her share of the matrimonial gains. Her separation from her husband by mutual consent, or because of his cruelty, will not affect her right in the community property. If, however, she willfully abandons her husband and lives in adultery with another, she forfeits her share of the common property."⁵

This case was practically overruled in *Routh v. Routh*,

¹ *Craig v. Craig*, 31 Tex. 203.

² *Rice v. Rice*, 21 Tex. 69.

³ *Moore v. Moore*, 59 Tex. 59.

⁴ *Byrne v. Byrne*, 3 Tex. 341.

⁵ *Wheat v. Owens*, 15 Tex. 241.

where the court held that the rights of property acquired by and consonant on the marriage state are fixed by law, that marriage attaches to it as a sequence the continued right of the wife to an equal interest in the community property, until that right is, in some mode recognized by the law, forfeited, and that the existence merely of a cause of divorce does not necessarily impair her marital rights to property, such rights co-existing "with the contract of marriage—a part of its essence—irrespective of any mere balance sheet to be struck between herself and her husband, on account of their respective moral or conjugal merits or demerits, or that would show as a debit against her, that her husband may have had just grounds, which *he had never legally asserted*, for terminating by law his relations with her." In this case the husband, on account of the cruel treatment of his wife, had left her and his home in Illinois, removed to Texas, married again in Texas, and while so married acquired certain property, the second wife being ignorant of any prior marriage. There was never any divorce from the first wife. It was held that the first wife lost none of her rights in property so subsequently acquired, she being the only lawful wife of the said husband.¹

When the community property is not divided at the time of the divorce, either party may afterwards bring suit for a partition.² In *Hardin v. Hardin*³ the court said: "Each party was left by the decree of divorce with such property as he or she had at the time. If

¹ *Routh v. Routh*, 57 Tex. 593; *Babb v. Carroll*, 21 Tex. 766; *Newland v. Holland*, 45 Tex. 590.

² *Byrne v. Byrne*, 3 Tex. 341; *Wright v. Wright*, 7 Tex. 526; *Andrus v. Randon*, 34 Tex. 536; *Whetstone v. Coffey*, 48 Tex. 273.

³ *Hardin v. Hardin*, 38 Tex. 616.

there was a cause of controversy between them as to any property, such controversy should *then* have been made; if not made, it was waived and lost." In *Whetstone v. Coffey*, the court criticise this by saying: "This was an opinion—not a decision," and then said, referring to the above statute: "This certainly secures to either party the right to file such pleadings as will inform the court of the character and extent of the property to be partitioned, and may empower the court to require it to be done, especially in the interest of the children, if there should be any. But suppose the parties do not ask it, and the court does not require it to be done. Could it have been contemplated by the legislature, in the enactment of this law, that the failure to do it would produce, by implication, the very result which they expressly prohibited the court from doing—which is or may be to divest the wife of her title to the whole of the community property left in the hands of the husband? Such a result could hardly have been anticipated."

§ 42. The earnings of the wife.—*California*.—Under the Spanish and Mexican law the earnings of the wife were community property.¹

Under the Act of 1850 they were community property, being property acquired during marriage otherwise than by gift, bequest, devise, or descent. This statute proceeded upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, *equally contributing by his or her industry to its prosperity*, and that to the

¹ *Fuller v. Ferguson*, 26 Cal. 567.

community all acquisitions by *either*, whether made jointly or separately, belong.¹

In 1870 an Act was passed, sections 1 and 2 of which read as follows :

“SECTION 1. The earnings of the wife shall not be liable for the debts of the husband.

“SECTION 2. The earnings and accumulations of the wife, and of her minor children living with and being in her custody, while the wife is living separate and apart from her husband, shall be the separate property of the wife.”²

The Code contains the same provisions as this Act of 1870.³ The earnings of the wife, though living with the husband, are relieved from liability for his debts.⁴

They certainly are, however, common property. Her earnings, *while living separate from her husband*, are her separate property.⁵

In *Marlow v. Barlew*,⁶ the court say: “Her earnings are her separate property (secs. 168 and 169).” This is not correct. If such had been the intention of the legislature, such care would not have been taken to distinguish between her earnings *when living with* and *when living apart from* her husband. The only effect of section 168 is to exempt the wife’s earnings from being attached or seized on execution for the husband’s debts.⁷

¹ *Meyer v. Kinzer*, 12 Cal. 252.

² *Hittell’s General Laws*, 8834, 8835.

³ Civil Code, 168, 169.

⁴ *Finnigan v. Hibernia S. & L. S.*, 63 Cal. 390.

⁵ Civil Code, § 169.

⁶ *Marlow v. Barlew*, 53 Cal. 459.

⁷ *Nevada*.—Compiled Laws, 163, 164 (same as in California). “When the husband has allowed the wife to appropriate to her own use her earn-”

Texas.—The earnings of the wife fall under the general rule concerning community property, there being no statutory provision exempting them.

§ 43. Liability of the community property for the ante-nuptial debts of the wife.—*California.*—The Act of 1850 provided that the separate property of the husband shall not be liable for the debts of the wife contracted before marriage, but the separate property of the wife shall be and continue liable for such debts.¹

The wife was liable *in personam* before coverture, and by our laws she continued so liable after marriage.²

Although our laws in regard to the property rights of the husband and wife were derived from the Spanish law, yet our whole system of law is based upon the common law of England, and this common law prevails except where it is changed by statute.

We have, by statute, changed the common law in regard to the debts of the wife contracted *dum sola*, in two respects, viz., her separate estate is made liable, and his (the husband's) separate estate is exempted. Otherwise his liability remains as at common law, and, therefore, the common property, the title to which is in him, is also liable for her ante-nuptial debts.³

The Code provides as follows: "The separate property of the husband is not liable for the debts of the wife contracted before marriage."⁴

ings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property." (Compiled Laws, 185.)

¹ Hittell's General Laws, 3575.

² Van Maren v. Johnson, 15 Cal. 308; Bostic v. Love, 16 Cal. 73.

³ Van Maren v. Johnson, 15 Cal. 308; Vlautin v. Bumpus, 35 Cal. 214.

⁴ Civil Code, § 170; *Nevada*—Compiled Laws, 186 (same as in California).

"The separate property of the wife is not liable for debts of the husband, but is liable for her own debts contracted before and after marriage."¹

Texas.—The community property is liable for the ante-nuptial debts both of the husband and wife. In each case the creditor has an additional remedy against the separate property of the husband and wife respectively.²

"At common law, though the wife has no property, the husband becomes immediately liable for her debts, because he is entitled to all that she may earn during the marriage [and because he acquired all her personal property and a freehold estate in her lands]. Now, with us the wife is supposed to be an equal contributor to the community estate. At least the revenues and profits derived from her separate estate, as well as whatever she may acquire by her industry and labor during coverture, become a part of it, and are subject to the uncontrolled possession and disposal of the husband. Is it unreasonable, then, to hold that he is liable for the ante-nuptial debts of the wife to the extent of the community estate in his hands? . . . Taking into view the entire statute, it seems obvious that the husband and wife have equal rights in respect to their separate property as well as to the community estate, except that the custody and management of the wife's separate property, as well as the absolute control and disposal of all the community property, are intrusted to the husband. . . . In contemplation of law, the community estate is the result of their joint and equal contributions. Its management and disposal during the marriage are given to the husband, not on the ground

¹ Civil Code, § 171; *Nevada*—Compiled Laws, 167 (same as in California).

² *Portis v. Parker*, 22 Tex. 706; *Taylor v. Murphy*, 50 Tex. 300.

of any greater interest of his in it, but merely for reasons of public policy and social economy. That parties dealing or contracting with members of the community might know the extent of their power and authority to bind their community property, it is provided that it 'should be liable for all debts of the husband and for the debts of the wife contracted during the marriage for necessities.' In other words, the husband's authority to bind the community is general and unlimited; the wife's, special and limited. The construction sought to be given to this clause of the section would violate the spirit and intention of equality between the spouses plainly manifest throughout this entire Act, as well as all of our statutes relating to marital rights. The husband's ante-nuptial debts would be a charge upon and could be paid out of the community estate, while the wife would have to discharge her's, if she had no separate estate, out of her half of its remainder, if she should survive the husband. It would also operate most oppressively to the creditors of the wife; for while it would give the husband the income and profits of her separate property, as well as all that she might acquire by her labor and industry, the creditors, after her separate property was exhausted, would be precluded from the collection of their debts, though the wife's interest in the community might be amply sufficient for their discharge. We do not think that this was either the spirit or the object of the law, or that a fair construction of it would lead to such a result."

It will be noticed upon what different grounds the California and Texas courts reach the same conclusion. The former bases its decision, as we have seen, upon the common law, holding that, in the absence of statu-

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tory enactment, the common law must prevail. The latter bases its decision, by analogy with the common law, upon the intent and meaning of the law of marital rights in that State.

In *Tarlton v. Weir*¹ the court say : " Where judgment is recorded against a married woman upon an indebtedness incurred by her before marriage, the judgment should be that execution issue against *her* separate property *only*, and should exempt the property of the husband from execution upon such judgment. *Query*, is *community property subject to such execution?*" The only case cited in support of this query is *Nash v. George*,² the case of *Taylor v. Murphy* having been apparently overlooked.

In *Nash v. George*, the question as to the liability of the community property for the ante-nuptial debts of the wife was not raised. The court, in its opinion, mentioned it without deciding it, saying, however, that there " was no reason why the debt of the *husband*, antecedent to marriage, should be paid out of the community gains, which would not apply with *equal force* to the debt of the *wife*, contracted *dum sola*." This idea was subsequently followed and decided to be correct in *Taylor v. Murphy*.

§ 44. Liability of the community property for the debts of the wife contracted during marriage.—*California*.—The liability of the separate property of the wife for her debts contracted during coverture has been already discussed.³ The liability of the community property therefor is thus prescribed in the Code :

¹ *Tarlton v. Weir*, Tex. Court of Appeals (Civil Cases), § 145.

² *Nash v. George*, 6 Tex. 236.

³ *Ante*.

"The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by pledge or mortgage thereof executed by the husband."¹ This was first enacted in 1874.

Necessaries.—There was no statutory regulation, prior to the Code, concerning liability for necessities furnished to the wife. The common law, therefore, prevailed, and the husband was liable (and consequently the community property) for debts incurred by the wife for necessities.²

The Code has the following provisions on the subject: "If the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband."³

"A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him, nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement."⁴

Texas.—The fourth section of the Act of 1840 provided that "the community property should be first liable for the debts contracted by the husband during the marriage, and for all the debts contracted by the wife for necessities during the same time."⁵

The third section of the Act of 1848 provided that the common property shall be liable for the debts of

¹ Civil Code, § 167.

² *Van Maren v. Johnson*, 15 Cal. 308.

³ Civil Code, § 174; *Nevada*—Compiled Laws, 172.

⁴ Civil Code, § 175; *Nevada*—Compiled Laws, 173.

⁵ *Portis v. Parker*, 22 Tex. 702.

the husband, and for the debts of the wife contracted during the marriage for necessities.”¹

The first section of the Act of 1856 provided that “the community property of the husband and wife shall be liable for all their debts contracted during marriage, except in such cases as are especially excepted by law.”²

The Revised Statutes now provide that the common property is liable for all debts contracted by the wife for necessities for herself or children, and for expenses incurred for the benefit of her separate estate, when the same are reasonable and proper.³

§ 45. Liability of the community property for the torts of the wife.—*Texas*.—The separate property of the husband is liable for damages resulting from the torts of the wife, but only after her separate property and the community property has been exhausted, the rule being that resort should be had first to her separate estate; then, if this be not sufficient, to the common estate; and lastly, if necessary, to the separate estate of the husband. The reason for this rule is thus stated in a recent case:⁴ “The common law, except so far as it is modified by the Constitution or statutes of this State, regulates the relationship of husband and wife, and his liability for her torts. Many changes from the common law have been made by statute in reference to property rights of married women; but we know of no statute which in any respect changes or alters the lia-

¹ Pasch. Dig. 4642.

² Pasch. Dig. 4646; Rev. Stats. 2857, 2164.

³ Pasch. Dig. 4643, 4644; Rev. Stats. 2854, 2855; *Ante*.

⁴ *Zeliff v. Jennings*, 61 Tex. 470.

bility of the husband for the torts of the wife from that imposed by the common law. Under that law they are deemed one person ; and the husband is liable to the same pecuniary responsibility for the torts of the wife as though the act were his own." In an earlier case¹ the court had said : " It is insisted, however, that the common law doctrine upon this subject is abrogated in this State by our statutes regulating marital rights. With us the separate identity of the wife, with respect to her property, is not merged in the husband. Her property is not vested in him by marriage. But the common law rule holding the husband responsible for the wife's torts does not rest entirely upon the ground that he takes by marriage all of her personal property, and that she is presumed to have no separate estate. It rests, perhaps, mainly upon the supposition that her acts are the result of the superior will and influence of the husband."

In *Zeliff v. Jennings*, *supra*, an action for libel against a married woman, a judgment was rendered against her, directing that it be satisfied in accordance with the above rule.

California.—The same rule must obtain in California. There has been no statutory change in the common law in this regard, and, therefore, the common law must control.²

¹ *McQueen v. Fulgham*, 27 Tex. 467.

² *Ante*.

CHAPTER V.

SOLE TRADERS, MARRIAGE CONTRACTS, ETC.

- § 46. Sole traders, the mode of becoming.
- § 47. The rights and liabilities of a sole trader.
- § 48. Management of the business of a sole trader.
- § 49. Marriage contracts.
- § 50. Alimony.
- § 51. A married woman's interest by inheritance in the separate estate of her husband.
- § 52. A married woman's interest by inheritance in the estate of her child.
- § 53. Right of a married woman to be an executrix, or administratrix.
- § 54. Right of a married woman to make a will.
- § 55. Effect of marriage upon the will of an unmarried man.
- § 56. The wife's obligation to support her husband.
- § 57. Curtesy and dower.
- § 58. Husband and wife as co-tenants.

§ 46. The mode of becoming a sole trader.—*California*—
(a) *Before the Code*.—The Act of 1852 provided that a married woman could become a sole trader by making a statement to any person authorized to take acknowledgments of deeds, that she intended to carry on a certain specific business in her own name and on her own account, and, when the amount to be invested in the business exceeded five thousand dollars, that this excess did not come from her husband. From the time that this statement was recorded in the county where she

was to do business, she became a sole trader.¹ It was not necessary that this statement or declaration should have any acknowledgment to it, nor that it should be published.²

³In 1862 this Act was amended so as to require a notice of intention to be published as is now prescribed by the Code.³ At first the husband was allowed to furnish his wife with money, to the amount of five hundred dollars.⁴

(b) *Under the Code.*—Section 1811, Code of Civil Procedure, provides that a married woman may become a sole trader by the judgment of the Supreme Court.

Section 1812 provides that she must first publish a notice of intention to become a sole trader, once a week for four successive weeks, specifying the day upon which she will make her application, the nature and place of the business proposed to be conducted by her, and the name of her husband. This last provision was not in the statute before the Code.

Section 1813 provides that ten days from the day named in the notice she must file a verified petition setting forth that the application is made in good faith, to enable the applicant to support herself, or herself and others dependent on her, giving their name and relation; the fact of insufficient support from her husband, and the causes thereof, if known; any other grounds of application which are good causes for a divorce, with the reason why a divorce is not sought; and the nature of the proposed business, the

¹ Hittell's General Laws, 6915.

² *Reading v. Mullen*, 31 Cal. 104.

³ *Post*; *Adams v. Knowlton*, 22 Cal. 284.

⁴ Hittell's General Laws, 6915; Stats. 1862, p. 108; *Guttman v. Scannell*, 7 Cal. 458.

capital to be invested therein, and the sources from which it is derived.

Section 1814 provides that she may invest in the business a sum derived from the community property or the separate property of her husband not exceeding five hundred dollars.¹

Any creditor of the husband may oppose the application by filing a written opposition, setting forth that the application is made to defraud him, or to prevent, or that it will prevent him from collecting his debt; or that any or all of the allegations in her petition are false.²

If the court find in favor of the petition authorizing the applicant to carry on in her own name and on her own account the business specified in the notice and petition, it must render judgment for her, and a certified copy of the decree with the following oath indorsed on it must be recorded in the county where the business is to be carried on, viz.: "I, A. B., do, in the presence of Almighty God, solemnly swear that this application was made in good faith, for the purpose of enabling me to support myself [and any dependent, such as husband, parent, sister, child, or the like, naming them], and not with any view to defraud, delay, or hinder any creditor or creditors of my husband, and that of the moneys so to be used by me in business no more than five hundred dollars have come either directly or indirectly from my husband, so help me God."³

She can not do business in any other county until she has recorded therein a copy of said judgment and oath.

¹ *Thomas v. Desmond*, 63 Cal. 426.

² Code of Civil Procedure, § 1815.

³ Code of Civil Procedure, §§ 1817, 1818.

§ 47. The rights and liabilities of a sole trader.—*California*.—The property, money, revenues, credits, and profits of her business belong exclusively to her and are not liable for the debts of her husband. She has all the privileges of, and is liable to all legal proceedings provided for debtors and creditors, and may sue and be sued alone, without being joined with her husband.¹

Under the Act of 1852 he was liable for her debts, if they were contracted with his written consent.²

The fact that a married woman is a sole trader and contracts a debt, raises the presumption that it was contracted on account of her business,³ the effect of the statute being to enable a married woman to contract debts on account of her business as if she were a *feme sole*.⁴

A transfer by the husband to her of his property for the purposes of her business is fraudulent and void as to his existing creditors.⁵

She can derive title to such property, however, only by the mutual consent of herself and husband, and by an act of transfer by the husband to her in the mode prescribed by law.⁶

She may sue and be sued alone.⁷ A complaint, in an action to recover a debt from her, is sufficient, if it alleges that she is a sole trader under the statute.

¹ Hittell's General Laws, 6915; Code of Civil Procedure, § 1819.

² Hittell's General Laws, 6919.

³ Melcher v. Kuhland, 22 Cal. 522.

⁴ McKune v. McGarvey, 6 Cal. 497; Camden v. Mullen, 29 Cal. 564.

⁵ Guttman v. Scannell, 7 Cal. 458; Hurlburt v. Jones, 25 Cal. 225; Thomas v. Desmond, 63 Cal. 426.

⁶ Thomas v. Desmond, 63 Cal. 426.

⁷ McKune v. McGarvey, 6 Cal. 497; Guttman v. Scannell, 7 Cal. 455; Code of Civil Procedure, §§ 370, 1819.

An allegation that "she was doing business as a *feme sole* with the consent of her husband" is insufficient.¹

§ 48. Management of the business of a sole trader.—*California*.—(a) *Before the Code*.—The husband was not prohibited by the Act of 1852 from managing the business for his wife. This prohibition was introduced in the amendment of 1862.² She could not, however, claim exemption from any liability on the ground that she permitted her husband to manage and control her business. This provision was intended only to prevent collusion between her and her husband, but not to shield her.³ The statute does not change the marital relation farther than as concerns the business of the wife as a sole trader.⁴

(b) *Under the Code*.—There is no provision in the Code concerning this matter.

§ 49. Marriage contracts.—*California*.—Section 14 of the Act of 1850, "defining the rights of husband and wife,"⁵ provides that "in every marriage thereafter contracted in this State, the rights of husband and wife shall be governed by this Act, unless there is a marriage contract containing stipulations contrary thereto."

Section 177 of the Civil Code provides that "the property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto."⁶

¹ *Aiken v. Davis*, 17 Cal. 120; *Melcher v. Kuhland*, 22 Cal. 523.

² *Hittell's General Laws*, 6917.

³ *Porter v. Gamba*, 43 Cal. 105.

⁴ *Saunders v. Webber*, 39 Cal. 287.

⁵ *Hittell's General Laws*, 3576.

⁶ *Nevada*—Compiled Laws, 177-181.

Sections 2178-2179 of the Civil Code provide that all contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved, and that they must be recorded in every county in which any real estate may be situated which is granted or affected by such contract.¹

As both the Act of 1850 and the Code confer upon parties the unlimited right to make, before marriage, any contract whatever in respect to property, they can agree that all their property shall be exempt from the control of the statute. Under such an agreement it would necessarily be governed by the common law. It was accordingly held, where a marriage settlement provided that there should be no community property, but that each one should hold and control his and her own property, separate and free from the other, that the wife had no power to make a contract, so as to entitle her to sue in her own name.²

A husband and wife can not, however, by any contract with each other alter their legal relations, except in regard to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation. The mutual consent of the parties is a sufficient consideration for such an agreement as the above.³

A minor capable of contracting marriage, may make

¹ *Snyder v. Webb*, 3 Cal. 83; *Connor v. Stanley*, 2 West Coast Reporter, 749.

² *Sheldon v. Steamship Uncle Sam*, 18 Cal. 535.

³ Civil Code, §§ 159, 160; *Schuler v. S. and L. Soc.*, 1 West Coast Reporter, 125; *Nevada—Compiled Laws*, 170, 171.

a valid marriage settlement.¹ Males of the age of eighteen years and females of the age of fifteen years are capable of consenting to and consummating marriage.² It would seem, therefore, that marriage contracts form an exception to the general rule regarding the contracts of minors.³

Texas.—"Parties intending to enter into the marriage state may enter into what stipulations they please, provided they be not contrary to good morals or some rule of law; and in no case shall they enter into any agreement, or make any renunciation, the object of which would be to alter the legal order of descent, either in respect to themselves, in what concerns the inheritance of their children or posterity, which either may have by any other person, or in respect to their common children; nor shall they make any valid agreement to impair the legal rights of the husband over the person of the wife, or the persons of their common children."⁴

"Every matrimonial agreement must be acknowledged before some officer authorized by law to take acknowledgments of deeds, and attested by a least two witnesses; the minor capable of contracting matrimony may give his consent to any agreement which this contract is susceptible of, but such agreement must be made by the written consent of both parents, if both be living; if not, by the survivor; if both be dead, then by the written consent of the guardian of such minor."⁵

A minor is a male or female under twenty-one years

¹ Civil Code, § 181.

² Civil Code, §§ 56, 25.

³ Civil Code, §§ 33, 56, 69; *ante*, § 25; Rev. Stats. of Tex. 2848.

⁴ Rev. Stats. 2847.

⁵ Rev. Stats. 2848.

of age, who has never been married.¹ The earliest age at which a female minor can contract marriage is fourteen, and a male minor sixteen.²

“No matrimonial agreement shall be altered after the celebration of the marriage.”³

“When the wife, by a marriage contract, may reserve to herself any property, or rights to property, whether such right be *in esse* or expectancy, such reservation, to be valid as to the subsequent purchasers or creditors of her husband, must be acknowledged and recorded as provided by law.”⁴

§ 50. Alimony.—*California*.—The Code is very explicit upon this subject. Its provisions are as follows: “Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband.”⁵ “While an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. When the husband willfully deserts the wife, she may, without applying for a divorce, maintain in the Superior Court an action against him for permanent support and maintenance of herself or of herself and children. During the pendency of such action the court may, in its discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and ex-

¹ Rev. Stats. 2471, 2858.

² Rev. Stats. 2839.

³ Rev. Stats. 2849.

⁴ Rev. Stats. 2850.

⁵ Civil Code, § 136.

ecutions may issue therefor in the discretion of the court. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court."¹

The court may compel payment of any money ordered to be paid, by imprisonment for contempt. This power of the court will not be resorted to if the court is satisfied that the husband is unable to make said payments.²

Prior to the Code the statute read as follows: "In any action for divorce the court may, during the pendency of the action, or at the final hearing, or afterwards, make such order for the support of the wife, and maintenance and education of the children of the marriage, as may be just, and may, at any time thereafter, annul, vary, or modify such order, as the interest and welfare of the children may require."³

In *Galland v. Galland*,⁴ the question arose as to whether the court could grant alimony other than in an action for divorce, and it was held that the power to decree alimony fell within the general power of a court of equity, independent of any statutory provisions, and that a court of equity could decree alimony in an action that had no reference to a divorce. A very able dissenting opinion was filed in this case by two of the five justices composing the court, holding that the statute excluded any other mode of allowing alimony than an action for a divorce. It was not until the year 1880

¹ Civil Code, § 137.

² *Ex parte Perkins*, 18 Cal. 60.

³ Hittell's General Laws, 2419.

⁴ *Galland v. Galland*, 38 Cal. 265.

that the Code was amended so as to crystallize the foregoing decision into a statutory enactment as above stated.¹

“Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such a suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.”²

In *ex parte Cottrell*,³ the court, after the judgment, made an order increasing the amount of alimony allowed in the judgment, and its action was sustained by the Supreme Court. Even pending an appeal the Superior Court has power to make an order for alimony. Such power, however, is not vested in the Supreme Court.⁴

When a judgment directs the payment of so much alimony a month, it is doubtful whether any undertaking on appeal can be given which would stay the execution of such judgment pending an appeal therefrom, or whether an appeal lies from such an order. Certain it is that the ordinary appeal bond and a bond in double the sum to be paid per month is not sufficient.⁵

In ascertaining the alimony to be allowed, the court will consider the earnings of the husband and his ability to earn money.⁶ There is no provision of law, however, authorizing the court to require the husband to

¹ Civil Code, § 137.

² Civil Code, § 139.

³ *Ex parte Cottrell*, 59 Cal. 417; *Everett v. Everett*, 52 Cal. 384.

⁴ *Reilly v. Beilly*, 60 Cal. 624.

⁵ *Ex parte Cottrell*, 59 Cal. 419.

⁶ *Eidenmuller v. Eidenmuller*, 37 Cal. 366.

pay, *subsequently* to the divorce, and out of his separate property, any sum toward the maintenance of the former wife, *when the divorce was for her offense*.¹

"The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver or by any other remedy applicable to the case."²

"In executing the five preceding sections the court must resort (1) to the community property; and (2) to the separate property of the husband." "When the wife has either a separate estate, or there is community property sufficient to give her alimony or a proper support, the court, in its discretion, may withhold any allowance to her out of the separate property of the husband."³

Texas.—The statutes in Texas are equally explicit upon this subject with those in California. "Pending any suit for divorce the court or the judge thereof may make such temporary orders respecting the property and parties as shall be deemed necessary and equitable."⁴

If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term-time or vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made.⁵

The court can grant alimony *pendente lite*, independently of the statute, by reason of its general equity powers. The reason for its action is the helplessness of

¹ *Everett v. Everett*, 52 Cal. 383.

² Civil Code, § 141.

³ Civil Code, § 142.

⁴ Rev. Stats. 2869; Pasch. Dig. 3454.

⁵ Rev. Stats. 2870; Pasch. Dig. 3456.

the complainant.¹ It is given to the wife for her present support. At common law the rule was based upon the presumption that the wife had no *separate property*, the same being by marriage vested in the husband. Under the statute the presumption is that she has *no income*, the fruits and profits of her separate property being common property and controlled and managed by the husband.

If, however, the wife has a separate income adequate for her maintenance, the husband is not liable for alimony *pendente lite*, either at common or statute law.²

In applications for alimony the wife should state the means at the disposal of the husband, whether they arise from her own or the community estate, or the separate property of the husband, and her application should be verified.³

If the husband is plaintiff, the court can refuse to proceed with the case until the alimony is paid. If it or any portion thereof remains unpaid at the dismissal of the action or the denial of the divorce, it can not be collected.⁴

The husband can be enjoined from selling or disposing of his separate property for the purpose of avoiding paying the amount of alimony decreed, and all sales made by him for that purpose may be decreed to be void.⁵

It seems to be well settled that, pending a divorce suit, a wife asserting a just claim for alimony is, within the meaning of statutes prohibiting fraudulent con-

¹ *Andrews v. Andrews*, Dallam, 375.

² *Wright v. Wright*, 3 Tex. 179, S. O. 6 Tex. 33.

³ *Wright v. Wright*, 3 Tex. 179.

⁴ *Wright v. Wright*, 6 Tex. 31; *O'Haley v. O'Haley*, 31 Tex. 503.

⁵ *Wiley v. Wiley*, 33 Tex. 362.

veyances, to be decreed a creditor, and accordingly a conveyance made by a husband pending a divorce suit, for the purpose of avoiding the claims of his wife, will be set aside.¹

Application for the payment of permanent alimony must be made in a reasonable time, and when it is payable annually, the court will not enforce the payment of arrears for more than one year.²

The wife can not be deprived of her right to support and maintenance by the act of the husband alone. This point arose in a recent case³ where the surviving wife was suing for damages for the death of her husband. It was claimed by the defense that she was not entitled to any damages because the deceased husband had not, for a year before his death, supported her or regarded her as his wife. The court held against this defense and said: "Henry Spicker (the husband) may have left his wife for a year or more before his death, and after leaving her may have had no further communication with her, and may have intended never to return to her, or contribute to her support; yet, so long as the marital relation existed, without reference to the will of the husband, *the wife not being shown to have forfeited her right thereto by her own wrong*, she was entitled to a decent support, in accordance with their station in life, from her husband."

§ 51. A married woman's interest by inheritance in the separate estate of her husband.—*California*.—If a person, having title to any estate not otherwise limited by mar-

¹ Lott v. Kaiser, 61 Tex. 672.

² Wright v. Wright, 6 Tex. 31.

³ Dallas and W. R. R. Co. v. Spicker, 61 Tex. 427.

riage contract, dies intestate, the estate goes one-half to the surviving husband or wife, and one-half to the child, or the lawful issue of such child. If there are more than one child, or one child and the lawful issue of a deceased child or children, or the lawful issue of deceased children, it goes one-third to the surviving husband or wife, and two-thirds to such child or children and such issue of deceased children. If there are no children or issue of deceased children, it goes one-half to the surviving husband or wife, and one-half to the father. If there is no father living, it goes one-half to the surviving husband or wife, and one-half to the brothers, sisters, and mother. If there are no brothers, sisters, or mother, it goes as a whole to the surviving husband or wife.¹

Texas.—The Revised Statutes prescribe as follows: “Where any person having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants. If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-

¹ Hittell's General Laws, 2329; Civil Code, § 1386.

half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; *provided, however*, that if the deceased have neither surviving father or mother, nor surviving brothers and sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate.¹

The husband's right to a life estate in one-third of the lands of the wife applies only to her separate property, and not to her moiety of the community property.²

§ 52. A married woman's interest by inheritance in the estate of her child.—*California*.—(a) *Before the Code*.—By the Act of 1850 the mother shared equally with the brothers and sisters in one-half of a child's estate (said child dying intestate), when there was no father, child, or issue of a deceased child of said intestate living. If there was no surviving husband or wife or father, she shared equally with the brothers and sisters in the whole estate. If there were no brothers or sisters living, she took the whole estate in preference to the issue of any deceased brother or sister.³

The Code changes the above rule by placing the mother on an equal footing with the father, sharing equally with him if he is living, and taking his place if he is dead.⁴

Texas.—The Revised Statutes provide that when any person, having title to any estate of inheritance, real, personal, or mixed, shall die intestate, and shall leave

¹ Rev. Stats. 1646.

² Walker v. Young, 37 Tex. 520.

³ Hittell's General Laws, 2329.

⁴ Civil Code, § 1386.

no surviving husband or wife, no children or their descendants, his estate shall go to the father and mother in equal proportions; if only the father *or* mother survive, then one-half shall go to the surviving father or mother, and one-half to the brothers and sisters and their descendants; but if there are no brothers or sisters or their descendants surviving, the entire estate shall go to the surviving father or mother. The same rule applies to grandparents and so on back.¹

§ 53. Right of a married woman to be an executrix, or administratrix.—*California*.—(a) *Executrix*.—Section 44 of the Probate Act (1851) provided that when an unmarried woman, who had been appointed executrix, should marry, her marriage extinguished her authority.² In 1861 this was amended by adding the following clause: "When a married woman is *nominated* as executrix, she may be appointed and serve in every respect as if she were a *feme sole*."³ In *Chapman v. Hollister*, the widow had been appointed executrix and had *subsequently* married. The court considered, without deciding, the question as to whether she *thereby* lost her right to continue as executrix.

(b) *Administratrix*.—There was, until 1866, no prohibition against the appointment of a married woman as an *administratrix*, although it was provided that the marriage of an unmarried woman should revoke letters of administration previously granted to her. In 1866 the Probate Act was amended so as to provide as fol-

¹ Rev. Stats. 1645.

² Hittell's General Laws, 5742; Code of Civil Procedure, § 1352; *Nevada*—Compiled Laws, 524.

³ Hittell's General Laws, 5742; Code of Civil Procedure, § 1352; *Teschmacher v. Thompson*, 18 Cal. 20; *Chapman v. Hollister*, 42 Cal. 462.

lows: "Administration shall not be granted to or at the request of a married woman."¹

The Code provides as follows: "A married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is extinguished."² The rule also obtains under the Code that administration can not be granted at the request of a *married* woman.³ The surviving husband or wife, of course, comes first among those entitled to letters of administration.⁴ Although a non-resident can not receive letters of administration, and, therefore, can not request the appointment of any other person, yet an exception is made, as to the right to so request, in favor of a non-resident surviving husband or wife.⁵

Texas.—In the Act of 1848 there was the following provision: "Whenever a *married woman* may be appointed executrix, or administratrix, and shall wish to qualify as such, she may, jointly with her husband, execute such bond as the law requires, and acknowledge the same before the Chief Justice of the court where the will was proved, or the letters were granted; and such bond shall bind her estate in the same manner as if she were a *feme sole*; and whenever an executrix, or administratrix may be a *married woman*, she and her husband shall act jointly in all matters pertaining to her said representative capacity."⁶

¹ Hittell's General Laws, 5754, 9179.

² Code of Civil Procedure, § 1370.

Nevada.—The Nevada statute provides that when an administratrix marries her authority ceases. (Compiled Laws, 537; *Buckley v. Buckley*, 16 Nev. 180.)

³ Code of Civil Procedure, § 1379; *Estate of Kelly*, 57 Cal. 81; *Estate of Beech*, 63 Cal. 458; *Estate of Hyde*, 12 Pacific Coast Law Journal, 321.

⁴ Hittell's General Laws, 5750; Code of Civil Procedure, § 1365.

⁵ Code of Civil Procedure, § 1365; *Estate of Cotter*, 54 Cal. 217.

⁶ Pasch. Dig. 1584; *Mitchell v. Wright*, 4 Tex. 286.

This statute imposed upon the husband of a married woman, who might accept and qualify as executrix, or administratrix, the duty of assuming the representative capacity along with her. Letters were, therefore, refused to a married woman, unless her husband joined her in the application.¹

If, however, she was appointed executrix while unmarried, and gave her bond and then married, a new bond executed jointly with her husband was not necessary.²

In 1871 this Act was amended by providing that a married woman might, if her husband was absent from the State, or insane, or refused to join with her, execute her bond alone.³

In 1876 this (the last clause) was again amended by providing as follows: "Whenever an executrix may be a married woman she shall act as a *feme sole* in all matters pertaining to her said representative capacity; *provided*, that no married woman shall administer the estate of her former husband during the continuance of the second or subsequent marriage."⁴

This last *proviso* is similar to the provision in the Acts of 1856, 1876, and the Revised Statutes, to the effect that the marriage of the surviving wife puts an end to her authority, as survivor, over the community estate.

The Revised Statutes provide as follows: "When a married woman may be appointed executrix or administratrix, she may, jointly with her husband, or without

¹ Nickelson v. Ingram, 24 Tex. 634.

² Airhart v. Murphy, 32 Tex. 133.

³ Stats. 1871, p. 22.

⁴ Stats. 1876, p. 101.

her husband, if he be absent from the State, or insane, or refuses to join with her, execute such bond as the law requires and acknowledge the same before the county judge, county clerk, or any notary public of the county where the will was proved or letters were granted; and such bond shall bind her separate estate in the same manner as if she were unmarried, but shall not bind her husband as surety unless he sign and be approved as such.”¹

The surviving wife is of course entitled to letters of administration upon the estate of her husband in preference to any one else, and these letters may be granted to her although she is under twenty-one years of age.²

§ 54. Right of a married woman to make a will.—*California*.—By the Act of 1850 (April 10, 1850) a married woman could make, revoke, or alter a will, provided her husband's consent in writing was given, and attested, proven, and recorded as a will is required to be attested, proven, and recorded, unless she had the sole power conferred by marriage settlement or by the husband in writing, executed by her husband before marriage.³

In 1866 this was amended so as to give her the power to dispose of all her separate estate by will absolutely, without the consent of her husband, the same to be attested, witnessed, and proved in the manner provided for the wills of men and unmarried women.⁴

If an unmarried woman executes a will, it is revoked

¹ Rev. Stats. 261, 1894.

² Rev. Stats. 1857, 1861.

³ Hittell's General Laws, 7327.

⁴ Hittell's General Laws, 9554; Civil Code, § 1273; *Nevada*—Compiled Laws, 813.

by her marriage, and is not revived by the death of her husband.¹

Texas.—A married woman stands upon the same footing in this respect as if she were unmarried.²

§ 55. Effect of marriage upon the will of an unmarried man.—*California.*—Section 12 of the Act of 1850 contained this provision: "If, after the making of a will, the testator shall marry, and the wife shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage contract, or unless she shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received."³

Texas.—There seems to be no such or similar provision in Texas.

§ 56. The wife's obligation to support her husband.—*California.*—The Civil Code provides as follows: "The wife must support the husband, when he has not deserted her, out of *her separate property*, when *he has no separate property*, and there is *no community property*, and *he is unable from infirmity to support himself*."⁴

Texas.—There is no such or similar statutory provision in Texas.

¹ Hittell's General Laws, 7338; Civil Code, § 1300; *Nevada*—Compiled Laws, 822.

² Rev. Stats. 4857.

³ Hittell's General Laws, 7337; Civil Code, § 1299; *Nevada*—Compiled Laws, 821.

⁴ Civil Code, § 176; *Nevada*—Compiled Laws, 174.

§ 57. Curtesy and dower.—*California and Texas*.—No estate is allowed the husband as tenant by curtesy on the death of his wife, nor is an estate by way of dower allotted to the wife upon the death of the husband.¹ There is no such statutory provision in Texas, but the same rule prevails.

§ 58. Husband and wife as co-tenants.—*California*.—Husband and wife may hold property as joint tenants or as tenants in common, as well as community property.²

¹ Hittell's General Laws, 3572; Civil Code, § 173; *Nevada—Compiled Laws*, 157.

² Civil Code, § 161; *Nevada—Compiled Laws*, 158.

CHAPTER VI.

THE HOMESTEAD.

- § 59. Definition.
- § 60. Homestead as a place of business for the head of the family.
- § 61. The lots constituting the homestead need not join or be contiguous to one another, and are not limited in number.
- § 62. Value.
- § 63. Urban homesteads.
- § 64. Rural homesteads.
- § 65. Blending of urban and rural homesteads.
- § 66. Dedication, how made.
- § 67. Dedication, by whom made.
- § 68. Dedication, out of what property.
- § 69. Title to land upon which there is a homestead.
- § 70. Conveying or incumbering the homestead.
- § 71. Forced sale of the homestead.
- § 72. Execution and appraisement.
- § 73. Abandonment of the homestead.
- § 74. Exchange of homestead.
- § 75. Tenure of a married woman in the homestead.
- § 76. Probate homesteads.
- § 77. Parties to actions concerning the homestead.
- § 78. Homestead of an insolvent.
- § 79. Effect of divorce upon the homestead.

§ 59. Definition.—*California*.—The homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated.¹ It is the dwelling place of the family, where they permanently reside. To constitute a family residence a homestead,

¹ Stats. 1850-3, p. 850; Stats. 1860, p. 311; Civil Code, § 1237; *Grange v. Gough*, 4 West Coast Reporter, 604.

there must be an actual occupancy, coupled with the intention of dedicating the premises to such a purpose. There must be some use, dedication, and appropriation of the land as a *home*.

It represents the dwelling house, at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots. In either case it is unlimited by *extent* merely.

The only tests are use and value. Whatever is used as a *place of residence* for the *family*, as contra-distinguished from a *place of business*, constitutes the homestead. It may be worth *less* than five thousand dollars: it must not be worth *more*. The object is to furnish a home free from the pursuit of creditors, not to furnish property of the value of five thousand dollars exempt from forced sale. If, therefore, only a part of the land claimed as a homestead be actually used and appropriated as the home of the family, the remainder, not so used and appropriated, forms no part of the homestead.¹

¹ Cook v. McChristian, 4 Cal. 24; Holden v. Pinney, 6 Cal. 234; Cary v. Tice, 6 Cal. 625; Benedict v. Bunnell, 7 Cal. 245; Ackley v. Chamberlain, 16 Cal. 181; McDonald v. Badger, 23 Cal. 394; Gregg v. Bostwick, 33 Cal. 228; Mann v. Rogers, 35 Cal. 319; Estate of Delany, 37 Cal. 179; Gambette v. Brook, 41 Cal. 83; Tiernan v. His Creditors, 62 Cal. 286; Englebrecht v. Shade, 47 Cal. 627; Ham v. Santa Rosa Bank, 62 Cal. 125; Ornbaum v. His Creditors, 61 Cal. 455.

Nevada.—In Nevada the rule is different. The law allows land of the value of five thousand dollars to be reserved as a homestead. A portion of it can be devoted to business or agricultural purposes. (Clark v. Shannon, 1 Nev. 569; Smith v. Stewart, 13 Nev. 68). In Clark v. Shannon, the court

In *Ackley v. Chamberlain* the premises consisted of a principal building, with barn, store-house, and out-houses appurtenant thereto, situated on one hundred and sixty acres of land. The principal building was used both as a residence and as a hotel. It was originally intended simply as a residence, but in the progress of erection, the design was changed so as to adapt it to a hotel. The nature and extent of the business did not interfere with its general character as a dwelling house. It was held to be a homestead.

In *Gregg v. Bostwick* the court said : " If, however, it is also used as a *place of business* by the family, which frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for family use independent of the business."

In *Tiernan v. His Creditors* the court said : " Upon the land is a double house, *intended for two families*. Tiernan never occupied more than the southerly half of the same, the other half has always been and is occupied by his tenants. The double house has two distinct entrances, and there is no connection between the two tenants (tenements) by which a person can go, within, from one house to the other. Under such circumstances, the court erred in setting apart that portion of the premises not occupied by Tiernan. The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated. In this case the claimant did not reside in the structure which was occupied by his tenants. The facts of this case are widely different from the case of a person

said : " We do not think it was the policy of the law to preserve only a residence for the family of the insolvent debtor, but to secure also the means for making a living."

residing in a building and renting a portion or portions of it to roomers or lodgers.”

In *Englebrecht v. Shade* the premises consisted of parts of two lots in a city, which formed a compact body. The residence was on one of the lots, and the other was used as a place for drying clothes and as a means of access to the street. It was held that a dedication of the whole premises as a homestead was good.

Growing crops.—On the 15th of March a man filed his petition in insolvency. At this time the premises constituting his homestead had been sown with wheat. After this wheat had ripened, and been harvested and threshed, the assignee in insolvency seized it. It was held that, at the time of the filing of the petition in insolvency and the assignment to the assignee, the growing wheat was a part of the homestead, at least to the extent that a conveyance of the homestead would have passed the growing crops, and therefore it had not passed to the assignee.¹

Definition.—*Texas.*—There is no definition of a homestead either in the Constitution or statutes. It is spoken of only as the “homestead of the family.” The Act of 1860 contains the following provision: “The homestead in a town or city . . . is hereby declared to be the lot or lots occupied or destined as a family residence.”² In the Constitution of 1876 and in the Revised Statutes there is the following provision: “*Provided*, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of the family.”³

¹ *Dascey v. Harris*, 3 West Coast Reporter, 202.

² Pasch. Dig. 3928.

³ Const. 1876, Art. XVI, § 51; Rev. Stats. 2336.

The homestead is the residence of the family, or the property dedicated as such.—It is the place where the head of a family sleeps and eats, where he surrounds himself with the ordinary insignia of home, and enjoys its immunities and privacy.¹ It is “the inviolable sanctuary of the *family*; not merely of the *head* of the family, but of all its members, whether consisting of husband, wife, and children, or any other combination of human beings, living together in a common interest and having a common object in their pursuits and occupations. Such a combination of persons, thus circumstanced, necessarily constitutes a family. If the property on which they are domiciled belongs to either, or to all, so living together, it equally comes within the purview of the constitutional guaranty, and is in fact a homestead. It is the homestead of a family, and not the head of the family simply, that is protected.”²

The homestead is reserved for the minor children and the head of the family. These minor children may be children, grandchildren, wards, or apprentices, and the head of the family may be the father, mother, grandfather, grandmother, or guardian. When the children arrive at the age of majority, and especially when they leave the family of their parents and become a separate family, they no longer form a part of the old family as far as the homestead right is concerned.³

There must be a family.—The mere temporary or indefinite union of persons in one household does not con-

¹ *Philleo v. Smalley*, 23 Tex. 502; *Holliman v. Smith*, 39 Tex. 362; *Houston and G. N. R. R. Co. v. Winter*, 44 Tex. 610; *Woolfolk v. Ricketts*, 48 Tex. 37.

² *The Homestead Cases*, 31 Tex. 679.

³ *Sossaman v. Powell*, 21 Tex. 664; *Hoffman v. Neuhaus*, 30 Tex. 636; *Burns v. Jones*, 37 Tex. 61.

stitute a family within the meaning of the Constitution. It can not be said that, because a party may, in consideration of the service of hirelings, or of persons permissively residing with him, pay them wages, or contribute in whole or in part to their support, there is a family as contemplated in the Constitution. The homestead exemption may extend to cases of a single man supporting his aged parents, or his helpless relatives nearly related to him, but not to a single man with only domestics or servants about him.¹

A man, unmarried and alone, without any family, occupied for years, simply as a sleeping apartment, a house on certain land, eating elsewhere. It was held that there was no *family* and hence no homestead.²

An unmarried man used one of the two rooms in his house as a grocery, and the other as his sleeping room, but eat his meals at the tavern. It was held that there was no homestead.³

A widow, with several minor children, at the request of her mother, removed to the homestead of the latter and took up a residence with her, and was so residing with her at the death of the latter. It was held that she was not a constituent of the family, so as to be entitled to the homestead.⁴

In *Roco v. Green* the court laid down the following general rules to determine when the relation of a family, as contemplated by law, exists: "(1) It is one of social status, not of mere contract; (2) legal or moral obligation on the *head* to support the other members; (3)

¹ *Howard v. Marshall*, 48 Tex. 477; *Whitehead v. Nickelson*, 48 Tex. 529.

² *The Homestead Cases*, 31 Tex. 679.

³ *Philleo v. Small*, 23 Tex. 502.

⁴ *Roco v. Green*, 50 Tex. 488.

corresponding state of dependence on the part of the other members for his support." The court also said: "We think that the law contemplated, as a general rule, at least, that, as the older members of the family grew up and married or moved off and left the paternal roof, the legal relation of a family as it had formerly existed, ceased, and that other and new relations and families would spring up. We do not say that the family relation or a part of it might not again become reunited, or that a widowed daughter might not seek an asylum from the misfortunes of life within the home of an aged mother, under such circumstances as would make her a constituent of the family."

It is the home only that is protected.—Where a man owned two adjoining lots on each of which was a residence and necessary outhouses, etc., but lived on only one of them, renting the other, it was held that the latter was no part of the homestead.¹

There is nothing in the Constitution or laws that forces the homestead character upon a lot or lots adjoining the one upon which the residence is situated. There are two requisites that must concur to give these lots the homestead quality: the claimant must intend the property as part of his homestead, and must in some way use it as such. Where a man had his residence on one lot, outhouses on another, and his garden in another, then built a house on one lot and rented it for twenty years, when he and his wife mortgaged the same, it was held that this lot was not a part of the homestead.²

The fact that the head of the family has a parcel of land upon which the family lives, and which thereby

¹ *Peregoy v. Kottwitz*, 54 Tex. 500.

² *Andrews v. Hagadon*, 54 Tex. 575; *Post*.

becomes entitled to protection as a homestead, can not attach such character to a detached portion of land not used for the purposes for which the homestead exemption is given.¹

The use of a block or more of ground in a town or city, in the manner and for the purposes for which such property is ordinarily used as a home, even though some of the uses may return nothing in a pecuniary way, and may be merely ornamental, or tending in some way to the comfort, convenience, or pleasure of the place as a home, will protect as a homestead the entire property. If, however, a person owning a block in a city upon which his home stands should erect thereon, solely for the purpose of renting them to others, large and costly buildings, to be used for mercantile or other purposes, and should so use them, the homestead character does not continue as to such.²

A man owned and occupied as his home a lot on one side of a public square in a certain town. On the opposite side of this square he owned certain other lots, but which were never inclosed or improved. The only use that he ever made of these lots was to occasionally stake his horse or calf thereon to graze. It was held that this "casual resort to property now and then can not be said to be an appropriation of it to the purposes of a home," and that they were not a part of his homestead.³

§ 60. The homestead may also be used as a place of business for the head of the family.—*Texas*.—The exemption is not

¹ *Brooks v. Chatham*, 57 Tex. 34.

² *Medlenka v. Downing*, 59 Tex. 39.

³ *Effinger v. Cates*, 61 Tex. 590.

limited merely to a residence where the family may eat, drink, and sleep, but may include also a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family. This rule obtained prior to any constitutional or statutory enactment.¹

The Constitution of 1876 and the Revised Statutes provide that the "homestead must be used for the purposes of a home or as a place to exercise the calling or business of the head of the family."² Under the Constitution of 1876 "the head of a family may possess a dual homestead, disjoined and isolated as respects locality of lots and houses within a town or city, and each of them dedicated to distinct uses. The one, domestic, the hearthstone home; the other, the industrial home, or place of work or of business for the head of the family. The one, his 'vine and fig-tree,' the refuge of the family against the misery and the desolation which the homeless know; the other, a sea-wall uplifted against the tide and waves of poverty and disaster, securing to him a spot of earth where he, and his family after him, may toil and earn their bread."³

Although the Constitution and statute both provide that the homestead must be used for the purposes of a home, *or* as a place to exercise the calling or business of the head of the family, yet this "*or*" means "*and*." This means that the homestead may include, *in addition to the residence*, a place of business.⁴ The home and the place of business need not be upon the same

¹ Pryor v. Stone, 19 Tex. 373; Hancock v. Morgan, 17 Tex. 586.

² Art. XVI., Sec. 51; Rev. Stats. 2336.

³ McDonald v. Campbell, 57 Tex. 618; Miller v. Menke, 56 Tex. 562.

⁴ Miller v. Menke, 56 Tex. 562; McDonald v. Campbell. 57 Tex. 618.

or upon contiguous lots.¹ The exemption of the place of business, however, *when it is detached from the home*, can only be kept up by use thereof, and an abandonment thereof as a place of business, will withdraw the exemption therefrom, although the lot upon which the home of the family may stand may still be used by the family as a home.²

To preserve the place of business, which is separate and distinct from the home, as part of the homestead, two things must concur: 1st, the head of a family must have a calling or business to which the property is adapted and reasonably necessary; 2d, such property must be used as a place to exercise the calling or business of the head of the family. It matters not what the calling or business of a man may be, if he does not use the property, *at the time of the forced sale*, in such business or calling, the exemption is lost. The law exempts only that which is so used, not that which the owner would like or hopes to so use. Where a man failed in his business as a merchant and went to clerking for other people, it was held that his lot and store, which he was compelled to cease to use, were no longer exempt, even though he intended to resume his business therein if he was ever again able so to do.³

The words "*calling*" and "*business*," taken together, embrace every legitimate avocation by which an honest support for a family may be obtained.⁴

§ 61. The lots need not join or be contiguous to one another, and are not limited in number.—*Texas*.—The only requisite

¹ *Post*; *Oliff v. Kaufman*, 60 Tex. 64.

² *Miller v. Menke*, 56 Tex. 562.

³ *Shryock v. Latimer*, 57 Tex. 677.

⁴ *Id.*

is that the property should be used for the convenience or uses of the head or members of the family. It is not material how many or how far or how near or remote from each other, may be the lots occupied for the convenience of the family, and for the prosecution of the business or employment of its head or members. It is not necessary that the shop or office or store should be part of the same building or on the same lot with the residence of the family.¹

A man resided on the same lot on which was his store, the two houses being about two hundred yards apart, with a street between them. It was held that the whole was his homestead, the total value not exceeding \$2,000.²

A man, the head of a family, was possessed of and occupied a residence, with garden, lot, and other ordinary appendages of a homestead, in a certain town. While residing upon this homestead, he purchased a tract of land, being about eleven acres, and separated by lots and streets from his residence. This tract he cleared for cultivation. His business was that of a mechanic. It was held that it was not so connected, by its use or otherwise, with his residence as to constitute it a part of his homestead. The court said: "The fact that it was a lot in town, if it was so, and made to contribute to the support of the family, either by cultivating it himself or by renting it to others, did not make it a part of the homestead, simply because, neither by its locality nor its use was it a part of his

¹ *Pryor v. Stone*, 19 Tex. 373; *Hancock v. Morgan*, 17 Tex. 586; *Williams v. Hall*, 33 Tex. 215; *Ragland v. Rogers*, 34 Tex. 621; *Methery v. Walker*, 17 Tex. 593.

² *Moore v. Whitis*, 30 Tex. 443.

home, in the sense in which a homestead is regarded under the Constitution and laws of this State. Had it been a garden or house lot, used in connection with the residence as such appendages are commonly used in a town, its separation by a street would not have prevented it from being a part of the homestead."¹

A man owned a lot in a town, and three other lots, called "farm lots," within the corporate limits, but quite a distance from the other lot called a "town lot." The latter was his residence. The others were used by him as a farm. His business was the practice of medicine. It was held that these "farm lots" were used on the basis of a planting or farming establishment, and were not an appendage of the town residence, and therefore not a part of the homestead.²

A man owned two acres of ground in a town, upon which he lived with his family. He owned another lot upon which was his drug store, in which he carried on his business as a druggist, and also another lot upon which was a building that he used as a ware-room for storing some of his drugs. The lots were not contiguous. It was held that this last lot was not a lot used "as a place to exercise the calling or business of the head of a family," but that the drug store and lot was such place of business, the former being used merely collaterally in connection with such business.³

In *Keith v. Hyndman* the facts were as follows: A man with his family lived upon one lot in a town, he had his blacksmith shop on another, and he owned a tract of ten acres that was partly within and partly

¹ *Evans v. Womack*, 48 Tex. 231.

² *Rogers v. Ragland*, 42 Tex. 440; *Ragland v. Rogers*, 34 Tex. 617.

³ *McDonald v. Campbell*, 57 Tex. 617.

without the corporation boundary, the portion within said boundary being used as a garden and poultry yard for supplying his family with vegetables and poultry, the portion without said boundary not being used for any purpose connected with the home establishment. It was held that the homestead exemption applied to all but the last mentioned part, but not solely because of its position with regard to said boundary line, the court saying: "We do not determine in this case that such boundary line establishes, under all circumstances, a conclusive and unvarying standard whereby the extent of a town or city homestead is to be determined.

. . . We mean in this case to decide that in view of the distance of the three acres which were outside of the city limits from the defendant's domicile, and of the mode of its use, that it can not be regarded as a lot or lots exempted as a part of the city homestead, it not being, in the meaning of the Constitution, a lot within a town or city."¹

"It is true that the limitation is not to the number, but to the value of the lots, and yet it is believed that a town or city homestead can not properly be said to include vacant, unoccupied lots, unappropriated to any use for the benefit of the family. . . . It is believed that one lot worth not more than \$500, if it alone be occupied as the homestead of the family, or used for the convenience of that family, will limit the extent of that homestead, in a town or city, as fully as though it was worth \$5,000."

"Giving the widest scope to the term 'town or city homestead' which has been applied by any judicial interpretation in this State, it extends only to such lot

¹ Keith v. Hyndman, 57 Tex. 429.

or lots *as are used for the convenience of the family*, such as gardens or yards used and occupied for the convenience of the family, and the lot containing the office of a professional man, the shop of the mechanic, or the business house of the merchant.”¹

The only limitations on an urban homestead, under the Constitution of 1876, are that it should be used for the purpose of a home, or as a place to exercise the calling or business of the head of the family, and that it should not, without reference to the improvements, exceed in value \$5,000 at the time of the designation as a homestead. It mattered not whether an adjoining lot to the residence is a necessity or a mere convenience to the enjoyment of the homestead. The law does not draw the line between necessity and convenience. The only question is whether the lot or portion thereof is, in fact, a part of the homestead.²

This rule as to contiguity of lots applies to homestead not in a town or city.³

If a party purchase a tract of land contiguous to the land upon which he resides, the two tracts not exceeding the maximum area designated by the Constitution for the *rural* homestead, the same would at once become a part of the homestead, by virtue of the actual use of the land as a homestead, in the absence of an intention not to make it a part of the homestead. But if such tract is not contiguous to the residence tract it could not become a part of the homestead by any fact less than would be necessary to designate the home-

¹ Clark v. Nolan, 38 Tex. 422; Iken v. Olenick, 42 Tex. 197.

² Arto v. Maydole, 54 Tex. 247.

³ Pryor v. Stone, 19 Tex. 371; Hancock v. Morgan, 17 Tex. 583; Williams v. Hall, 33 Tex. 215; Ragland v. Rogers, 34 Tex. 621.

stead originally. The fact that the two tracts are several miles apart is immaterial.¹

§ 62. Value.—*California*.—The homestead must not exceed in value five thousand dollars when claimed by the head of a family, and one thousand dollars when claimed by any other person.²

Texas.—The Act of 1839, in which the homestead originated, described it as "*fifty acres* of land, or *one town lot*, including his or her homestead, and improvements not exceeding *five hundred dollars* in value."³

The Constitution of 1845, 1861, and 1866 provided that the homestead of a family, *not in a town or city*, should not exceed *two hundred acres* of land, while *in a town or city*, it might consist of a lot or lots not to exceed in value *two thousand dollars*.⁴

The Act of 1860 provided as follows: "The homestead in a town or city, exempt from forced sale, is hereby declared to be the lot or lots occupied or destined as a family residence, not to exceed in value two thousand dollars, at the time of their designation as a homestead; *nor shall the subsequent increase in the value of the homestead, by reason of improvements or otherwise, subject the homestead to forced sale.*"⁵

The Act of 1866 was an enlargement of the Act of 1860, and provided as exempt from forced sale, "Two hundred acres of land, including his or her home-

¹ *Campbell v. Macmanus*, 32 Tex. 451; *Brooks v. Chatham*, 57 Tex. 33.

² Stats. 1850-3, p. 850; Stats. 1860, p. 311; Civil Code, § 1260. *Nevada*—Compiled Laws, 186.

³ Hart. Dig. 1270; Pasch. Dig. 3798; *Houston and G. N. R. R. Co. v. Winter*, 44 Tex. 610; *Wood v. Wheeler*, 7 Tex. 13.

⁴ Art. VII, § 22.

⁵ Pasch. Dig. 3928.

stead (not included in a town or city), or any town or city lot or lots, in value not to exceed two thousand dollars, at the time of their designation as a homestead, nor shall the subsequent increase in value of the homestead, by reason of improvements or otherwise, subject the same to forced sale."¹

The Constitution of 1869 provided that the homestead in the country should not exceed two hundred acres of land; in a village, town or city it should not exceed *five thousand dollars* in value, and that this limitation should exist *at the time of the designation of the homestead, and without reference to the value of any improvements thereon.*²

The Constitution of 1876 and the Revised Statutes provide as follows: "The homestead not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town, or village, shall consist of a lot, or lots, not to exceed in value \$5,000, at the time of their designation as the homestead, without reference to the value of any improvements thereon; *provided*, that the same shall be used for the purpose of a home, or as a place to exercise the calling or business of the head of a family; *provided, also*, that any temporary renting of the homestead shall not change the character of the same, where no other homestead has been acquired."³

It will be noticed that there are two kinds of homesteads, *urban* and *rural*, in the former of which the

¹ Pasch. Dig. 3802.

² Art. XII, § 15.

³ Art. XVI, § 51; Rev. Stats. 2336.

limitation is as to *value*, while in the latter it is only as to *quantity*.

§ 63. Urban homesteads.—*Texas*.—A homestead in a town or city was at first limited to *one* town lot with improvements not exceeding in value *five* hundred dollars.¹ It was by the Constitution of 1845 increased so as to include *one or more* town lots, not exceeding in value *two thousand* dollars. By the Constitution of 1869 it was again increased from two thousand to *five* thousand dollars, and this value has not been since changed.

At first the rule obtained that the *improvements* were included in the valuation of two thousand dollars.¹ In the Homestead Cases, the last clause in the Acts of 1860 and 1866,² providing that the subsequent increase in value by reason of *improvements* or otherwise, should not subject the homestead to forced sale, was declared unconstitutional.

This caused the constitutional amendment of 1869, which provided that the limitation as to value was without reference to the value of the improvements thereon.³ The same provision is contained in the Constitution of 1876 and in the Revised Statutes, and is now the law.⁴ If the homestead is of less value than two thousand dollars, it may be increased by the addition of one or more lot or lots until that value is reached. But if it is of the value of two thousand dollars at

¹ Wood v. Wheeler, 7 Tex. 16; Williams v. Jenkins, 25 Tex. 279; North v. Shearne, 15 Tex. 175; McLane v. Paschal, 3 Tex. Law Reporter, 258.

² North v. Shearne, 15 Tex. 175; Hancock v. Morgan, 17 Tex. 584; Franklin v. Coffee, 18 Tex. 416; Williams v. Jenkins, 25 Tex. 306; The Homestead Cases, 31 Tex. 684; *Ante*.

³ *Ante*.

⁴ *Ante*.

the time of the addition of other lot or lots, the latter do not become a part of the homestead, even though its value at the time of its original dedication was less than this amount.¹ The provision in the Act of 1860 as to a subsequent increase "by reason of improvements or otherwise," meant "the subsequent increase in value of the property by any kind of appreciation in *value*, not a further increase by addition of other lots and other undivided interests in lots."²

If a homestead was dedicated under the Constitution when the limitation in value was only two thousand dollars, and it subsequently increased in value not to exceed the amount subsequently reserved, it is protected.³

§ 64. Rural homesteads.—*Texas*.—A homestead not in a town or city was at first limited to *fifty* acres of land. By the Constitution of 1845 this was increased to *two hundred* acres, and this is now the law.⁴

The question as to *improvements* does not arise in regard to rural homesteads, as they are not limited in *value*. The dwelling could always be a palace or a cabin, without affecting the homestead character of the property.⁵

§ 65. There can be, except under extraordinary circumstances, no blending of the rural and the urban homestead, so that the homestead exemption can be partly in town and partly in the country.⁶

¹ Campbell v. Macmanus, 32 Tex. 451; S. C. 37 Tex. 267.

² Richards v. Nelms, 38 Tex. 446.

³ Baylor v. San Antonio National Bank, 38 Tex. 454.

⁴ *Ante*.

⁵ Houston and G. N. R. R. Co. v. Winter, 44 Tex. 610.

⁶ Iken v. Olwick, 42 Tex. 197; Keith v. Hyndman, 57 Tex. 429; Slavin v. Wheeler, 61 Tex. 654.

The including of a rural homestead within a town or city limits, without the consent of the owner and his wife, can not change such rural homestead of two hundred acres into a town or city homestead limited to \$2,000 in value.¹

A man, with the consent of his wife, may change his rural homestead into a city or town homestead, the same being included within the limits of some city or town, by laying it off into blocks, lots, streets, and alleys, by selling lots for residences, business houses, and other purposes, and by selecting a residence on a portion of it for himself and family.² This mode of changing a rural into a city or town homestead is somewhat questioned in *Nolan v. Reed*, decided immediately after *Clark v. Nolan*, *supra*.³

§ 66. Dedication, how made.—*California*.—*Before the Code*.—The first statute upon the subject pointed out no mode in which the intention to dedicate property as a homestead should be made known, nor did it require any public record to be made of the selection of the homestead. The following is the language of section 1 of the Act of 1851: "The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale on execution or on any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this Act, or if contracted and

¹ *Taylor v. Boulware*, 17 Tex. 74; *Bassett v. Messner*, 30 Tex. 610.

² *Clark v. Nolan*, 38 Tex. 421.

³ *Nolan v. Reed*, 38 Tex. 427.

incurred at any time in any other place than in this State.”¹

In the absence of any statutory rule the common law rule prevailed, viz.: “the occupancy of the family was presumptive evidence of the appropriation of the place as a homestead, and was consequently notice to all the world.”²

There must have been an actual occupancy by the *family*, and not by the *husband* alone. If the wife was absent from the State, there could have been no dedication of the property as a homestead.³

In 1860 section 1 of the Act of 1851, *supra*, was amended so as to read as follows: “The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the *husband and wife* or *either of them*, or *other head of a family*, shall not be subject to forced sale in execution or any final process from any court, for any debt or liability contracted or incurred after the passage of the Act to which this is amendatory. Said selection shall be made by either *the husband* or *wife* or *both of them*, or *other head of a family*, declaring their intention in writing, to claim the same as a homestead. Said declaration shall state that they or either of them are

¹ Stats. 1851, p. 296.

² Cook v. McChristian, 4 Cal. 26; Taylor v. Hargous, 4 Cal. 273; Holden v. Pinney, 6 Cal. 236; Reynolds v. Pixley, 6 Cal. 167; Dorsey v. McFarland, 7 Cal. 345; Stafford v. Lick, 7 Cal. 490; Moss v. Warner, 10 Cal. 298; Benson v. Aitken, 17 Cal. 165; Harper v. Forbes, 15 Cal. 204; Brooks v. Hyde, 37 Cal. 372.

Nevada.—The same rule obtained in Nevada prior to the Constitution. (Stats. 1861, p. 24; Goldman v. Clark, 1 Nev. 609.)

³ Cary v. Tice, 6 Cal. 630; Rix v. McHenry, 7 Cal. 91; Benedict v. Bunell, 7 Cal. 246.

married, or that he or she is the head of a family, that they, or either of them, as the case may be, are, at the time of making such declaration, residing with their family, or the person under their care or maintenance, on the premises (particularly describing them), and that it is their intention to use and claim the same as a homestead; which declaration shall be signed by the party making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded, and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as *joint tenants*, and all homesteads heretofore appropriated and acquired by husband and wife under the Act to which this Act is amendatory, shall be deemed to be held by such husband and wife in *joint tenancy*.”¹

This amendment made several important changes, viz.: (1) The selection could be made by the husband and wife, or either of them, or other head of a family, instead of by the owner alone; (2) the selection had to be made by a written declaration, duly recorded, instead of by simple occupancy; and (3) the homestead was declared to be held in joint tenancy. In this Act of 1860, there was a provision extending the benefits of this Act to homesteads acquired under the Act of 1851, providing the parties holding and claiming such homesteads duly filed for record, within one year from the date thereof, a declaration as required by this Act, and, further, treating such homesteads as abandoned unless

¹ Stats. 1860, p. 311; Hittell's General Laws, 3541.

Nevada.—Compiled Laws, 186 (same as California). This declaration must be filed. (*Child v. Singleton*, 15 Nev. 463; *Lachman v. Walker*, 15 Nev. 423.) Husband and wife are joint tenants, with right of survivorship. (*Smith v. Shrieves*, 13 Nev. 303.)

the declaration was so filed. In 1861 and 1862 this time was extended to the 1st day of June, 1862.¹

The effect of this provision was simply to give parties holding homesteads under the Act of 1851, the *privilege* of availing themselves of the Act of 1860, but *not* to compel them so to do. Until they filed such a declaration, or, if they did not elect so to do, until the expiration of the period allowed, their homesteads were governed solely by the Act of 1851.²

(b) *Since the Code*.—Section 1262, Civil Code, as first enacted, provided that “the husband and wife, or either of them, or other head of a family, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead.”

Section 1263, Civil Code, as first enacted, provided that “the ‘declaration of homestead’ must contain (1) a statement of the facts that show the person making it to be the head of a family; (2) a statement that the person making it is residing on the land, and claims it as a homestead; (3) a description of the land; (4) an estimate of its actual cash value.”

In 1874 section 1262 was amended so as to read: “In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.”

¹ Stats. 1860, p. 519; 1861, p. 232; 1862, p. 518; *Riley v. Pehl*, 23 Cal. 70; *Bartholomew v. Hook*, 23 Cal. 277; *Estate of Reed*, 23 Cal. 410; *Noble v. Hook*, 24 Cal. 638; *McQuade v. Whaley*, 31 Cal. 531.

² *Cohen v. Davis*, 20 Cal. 187; *Gluckauf v. Blivin*, 23 Cal. 314; *Brennan v. Wallace*, 25 Cal. 116; *McQuade v. Whaley*, 31 Cal. 534.

In 1874 section 1263 was amended so as to substitute, in place of subdivision one of the original section, the following: "A statement, showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit." This provision is new, and did not exist before the amendment of 1874.

The Code makes one change in the declaration, viz.: it requires in the declaration an *estimate of the actual cash value* of the premises.

A statement "that the *cash value* of the said above described premises is three thousand dollars" is good, the "*cash value*" being the same as the "*actual cash value*." The omission of the word "*actual*" is not material.¹

The value or an estimate thereof was not required to be stated in the declaration under the Act of 1860. If it had been so stated, the declaration would not have been evidence of the value.²

This is also true under the Code. The fact that the estimate of value contained in the declaration is true or false, or that it exceeds or falls short of or equals five thousand dollars, does not affect the validity of the declaration. The right of exemption is made to depend on the *actual value*, and not on the declarant's *estimate* of value; on an actual existing reality, not on the fallible or mistaken opinion of the declarant of what that real value may be.³

¹ Read v. Rahm, 3 West Coast Reporter, 150.

² Estate of Delaney, 37 Cal. 181.

³ Ham v. Santa Rosa Bank, 62 Cal. 125 (*per contra*, same case, 9 Pacific Coast Law Journal, 322); Tiernan v. His Creditors, 62 Cal. 286.

*The law in regard to the contents of a declaration is mandatory.*¹—*California*.—Where a mortgage was given and taken, in which the homestead was *expressly excepted*, the fact that in the declaration of homestead there was omitted a statement of its actual cash value was held to invalidate the declaration.²

Recording the declaration.—Both by the Act of 1860³ and by the Code⁴ the declaration must be recorded in the county in which the land is situated, and the homestead character attaches from and after the filing for record of the declaration.

An actual residence on the land at the time of the filing of the declaration of claim is necessary to consummate the homestead. This fact was required to be stated in the declaration before the Code⁵ and is a requisite under the Code. But this residence was not necessarily the residence of the husband. It might be the residence of the wife.

A declaration of homestead made by a married woman, under the Act of 1860, was valid, though her husband never resided or made his home on such homestead, and never executed or acknowledged the homestead claim made by her, in the absence of any showing as to the cause of his absence, or that he had another homestead, or any family other than his wife.⁶

Texas.—There is no statutory provision in Texas that the dedication of the land as a homestead shall be

¹ *Ashley v. Olmstead*, 54 Cal. 616; *Booth v. Galt*, 58 Cal. 254.

² *Grogan v. Thrift*, 58 Cal. 379.

³ *Ante*.

⁴ Civil Code, §§ 1264, 1265.

⁵ *Gregg v. Bostwick*, 33 Cal. 220; *Mann v. Rogers*, 35 Cal. 316; *Gambette v. Brock*, 41 Cal. 83; *Prescott v. Prescott*, 45 Cal. 59.

⁶ *Gambette v. Brock*, 41 Cal. 78.

by public record notice, except in case of the excess of a rural homestead over two hundred acres.¹

The ordinary mode of designating a homestead is by *occupancy*. The court has, in some instances, impressed the character of homestead upon property *intended* as such, but which at the time had not been actually occupied as a homestead. Where there has not been a previous actual occupancy, there should be at least a present *bona fide intention* to thus dedicate the property, coupled with such acts of preparation and subsequent early use as a homestead as would reasonably amount to notice, actual occupancy, with such intention, being notice that the property has been thus dedicated.²

A mere intention to make a piece of land the homestead at some time is not sufficient to give it the homestead character. There must be something more than mere intention; there must be some act done which will evince an intention to use it as a home, or, if separated from the tract upon which the home of the family stands, to use it in some way, in connection with the home place, for the comfort, convenience, or support of the family, or as a place of business for the head of the family. This, of course, must vary according to the character of the detached parcel of land, and the purpose to which it is adapted and for which it is intended.³

Whether any lot or lots are part of the homestead is a question of fact for the jury, to be determined by the evidence. There are two requisites that must concur to

¹ *Post*.

² *Anderson v. McKay*, 30 Tex. 188; *Holliman v. Smith*, 39 Tex. 362; *Moreland v. Barnhart*, 44 Tex. 280; *Barnes v. White*, 53 Tex. 630.

³ *Brooks v. Chatham*, 57 Tex. 33.

make them a part of the homestead: 1st, the owner must intend the property as part of his homestead; 2d, he must use it as such.¹

It is not necessary to secure the exemption as a homestead that a house be built or improvements made. But there must be a preparation to improve, and this must be of such a character and to such an extent as to manifest beyond doubt, the intention to complete the improvements and reside upon the place as a home.²

§ 67. Dedication, by whom made.—*California*.—At first the selection could be made only by the owner of the property.³ In 1860 it was provided that the selection could be made by either the husband or wife, or both of them, or other head of the family.⁴ The Code, as first enacted, provided that the selection could be made by the husband and wife, or either of them, or other head of a family.⁵ In 1874 it was amended so as to provide that the selection could be made by the husband, or other head of the family, or, in case the husband has not made the selection, then by the wife.⁶ The party making the selection must be actually residing upon the land at the time of the filing of the declaration.⁷ It is not necessary that the party or parties dedicating a homestead should be citizens of this State, or that they should intend to reside permanently in

¹ *Andrews v. Hagadon*, 54 Tex. 571; *Keith v. Hyndeman*, 57 Tex. 431; *Fost v. Powell*, 59 Tex. 321; *Hancock v. Morgan*, 17 Tex. 586.

² *Franklin v. Coffee*, 18 Tex. 417.

³ Act of 1851, *ante*, § 66.

⁴ Act of 1860, *ante*, § 66.

⁵ Civil Code, § 1262.

⁶ *Id.*

⁷ *Prescott v. Prescott*, 45 Cal. 58; *Babcock v. Gibbs*, 52 Cal. 629; *Dorn v. Howe*, 52 Cal. 635; *Aucker v. McCoy*, 56 Cal. 524.

this State. So long as they actually reside here and use the property as a home, they are entitled to a homestead.¹

The "*head of a family*," if a married person, was, under the Act of 1851, the husband. The homestead could be selected only by the "*owner*," and it could not be carved out of the separate property of the wife. It was not contemplated, therefore, that she could be considered as "*the head of a family*."²

As regards unmarried persons, the Act contained this provision: "*Provided*, that the exemption contained in this section shall not extend to *unmarried* persons, except when they have charge of *minor* brothers or sisters, or both, or brothers' or sisters' *minor* children, or a mother, or unmarried sisters living in the house with them."³

In *Revalk v. Kraemer*, however, the court said: "Any individual of either sex may be the head of a family. It is not necessary that the head of a family should be married."⁴ The Act of 1860 does not expressly define who is the "*head of a family*," but it speaks of the husband and wife, or *other* head of a family, and also provides for the selection of a homestead by an unmarried person, who has the care of his or her *minor* child, or of a minor brother or sister, or a *minor* child of a deceased brother or sister, or of a father or mother, or of a grandfather or grandmother,

¹ *Dawley v. Ayers*, 23 Cal. 110.

² *Revalk v. Kraemer*, 8 Cal. 71; *Gee v. Moore*, 14 Cal. 472; *Bowman v. Norton*, 16 Cal. 217.

³ *Stats.* 1850-3, p. 852.

⁴ *Post*.

or of an unmarried sister, then residing on the premises with such person.¹

Section 1261, Civil Code, defines the "*head of a family*" as: (1) the husband, when the claimant is a married person; (2) every person who has residing on the premises with him or her, and under his or her care and maintenance, either his or her *minor* child, or the *minor* child of his or her deceased wife or husband; a *minor* brother or sister, or the *minor* child of a deceased brother or sister; a father, mother, grandfather or grandmother; the father, mother, grandfather or grandmother of a deceased husband or wife; an unmarried sister; or any other of the relatives mentioned in this section who have attained the age of majority, and are unable to take care of themselves.

As this section was first enacted, in place of subdivision (1) above, it read "(1) the husband, (2) the wife." By the amendment the *wife* can not be the "head of a family." This is consistent with the amendment to 1262, *supra*.²

The law does not now recognize the wife as the "head of the family." She can act in the place of the husband, when he has not acted, but not as "*head of the family*." There is no practical difference whether she acts in one capacity or the other, in the matter of homesteads.

An unmarried woman who has the care of her bastard child may select a homestead.³

When an unmarried person ceases to be the head of a family, the privilege of the homestead ceases.—In Revalk

¹ Hittell's General Laws, 3541, 3546; Stats. 1862, p. 519.

² *Ante*.

³ *Ellis v. White*, 47 Cal. 75.

v. Kraemer, the court said: "The law intended to protect individuals while bearing certain relations towards each other. When that relation ceases, the cause of the protection is gone. The reason ceasing, the rule ceases. The privilege and responsibility must go together. When the individual no longer has the cares of a family, the law should not still protect him as if he had. He should only be protected as others are, who are at present in the same state. The law does not look to his past, or future, but to his present condition."¹

Under the Act of 1851, upon the death of the wife, without children, the surviving husband ceased to be the head of the family, and the protection of the homestead ceased. This occurred only, however, under the Act of 1851. Since then this rule has applied only to unmarried persons.² The Acts of 1851 and 1860 provided that an unmarried person should have certain persons under his care and maintenance then residing with him, in order to be entitled to "*select*" a homestead.³ The Act of 1862 prescribed the same conditions in order that such persons should be entitled to "*select and hold*" a homestead. It has, accordingly, been held that when minor children come of age, the unmarried person who had the care and maintenance of said minors ceased to be the head of a family, and his or her homestead right ceased to exist.⁴ The same rule obtains under the Code.⁵

¹ *Revalk v. Kraemer*, 8 Cal. 71; *McQuade v. Whaley*, 31 Cal. 535. *Nevada*—The same rule obtains in *Nevada*. Stats. 1879, p. 141.

² *Revalk v. Kraemer*, *supra*.

³ *Ante*.

⁴ *Stats.*, 1862, p. 519; *Santa Cruz Bank v. Cooper*, 56 Cal. 340.

⁵ *Ante*.

Texas.—The homestead can be dedicated only by the “head of the family.”

The husband is the “head of the family.” He, not the wife, chooses and establishes the homestead, and when he establishes it, *his* homestead becomes *her* homestead, whether she be willing or unwilling.

There can not be protected by law two homesteads for the same family, one for the husband and one for the wife. The law protects but one, and that one is the homestead dedicated as such by the “head of the family.” When *he* sees fit to change the homestead and dedicates another, *eo instanti* the new homestead becomes that of the family also.¹

If, upon a decree of divorce, the custody of the only child is given to the wife, she becomes the head of the family and is entitled to the use of the homestead, but only to a life estate therein, the same being community property. To give it to her in fee would be to deprive the husband of his title to real estate, a thing prohibited by statute.²

Domicile in the State is necessary to entitle a party to homestead rights. To constitute domicile, there must be not only residence, but also the intention to make the place of residence a home.

The purchase by a non-resident of property for the purpose of making it a home, is not sufficient to give to the property a homestead character.³

§ 68. Dedication, out of what property.—*California*.—
(1) *Lands held in joint tenancy or tenancy in common.* (a)

¹ *Hoffman v. Neuhaus*, 30 Tex. 636; *Holliman v. Smith*, 39 Tex. 362; *Woolfolk v. Ricketts*, 48 Tex. 37; *Slavin v. Wheeler*, 61 Tex. 654.

² *Tiemann v. Tiemann*, 34 Tex. 525.

³ *Alston v. Ulman*, 39 Tex. 159.

Before the Code.—A homestead, under the Act of 1851, could not be carved out of lands held in joint tenancy or tenancy in common. The right of each of his co-tenants was as great to the whole tract as was the right of the party attempting to select the homestead, and no mode was provided for the selection and ascertainment of their respective rights.¹

These decisions obtained under the amendments of 1860 and 1861, and accordingly, in 1868, an Act was passed, which provided that a party entitled to a homestead, who was *in exclusive occupation* of any tract of land, having the same inclosed, could carve a homestead out of said land, to the extent of his or her interest therein, though such land was held in joint tenancy, tenancy in common, or in any undivided ownership. A co-tenant or co-owner could obtain a partition or division whenever he desired.²

A partnership owned land prior to the Act of 1868. The firm becoming embarrassed, a division of the real estate was made between the two partners, and a homestead was filed by one of them upon a portion of it. It was held that this was in fraud of the creditors, as, while it was partnership property, it was liable for the

¹ *Wolf v. Fleishacker*, 5 Cal. 245; *Reynolds v. Pixley*, 6 Cal. 167; *Giblin v. Jordan*, 6 Cal. 417; *Kellersberger v. Kopp*, 6 Cal. 565; *Bishop v. Hubbard*, 23 Cal. 517; *Elias v. Verdugo*, 27 Cal. 418; *Seaton v. Son*, 32 Cal. 483; *Kingsley v. Kingsley*, 39 Cal. 666.

² *Hittell's General Laws*, 8507-9; *Cameto v. Dupuy*, 47 Cal. 80; *Higgins v. Higgins*, 46 Cal. 266; *Rousset v. Green*, 54 Cal. 136; *First National Bank v. Guerra*, 61 Cal. 111.

Nevada.—"Tenants in common may declare for homestead rights upon their respective estates in land, and hold and enjoy homestead rights therein, subject to the rights of their co-tenants to enforce partition of such common property as in cases of tenants in common." (Stats. 1879, p. 141.) A homestead can not be carved out of land held in partnership. (*Terry v. Berry*, 13 Nev. 520.)

partnership debts. It could not, therefore, by the act of the debtors alone, be exempted from this liability.¹

(b) *Under the Code.*—The homestead can be selected from land held in an undivided interest as well as from that held otherwise.²

(2) *Community property and separate property of the husband.*—The homestead can be selected from the community property and from the separate property of the husband. This is now and always has been the law.³

(3) *Separate property of the wife.*—(a) *Before the Code.* In *Revalk v. Kraemer* and *Riley v. Pehl* the court doubted whether homestead could be carved out of the separate estate of the wife. This doubt was based upon the fact that there was no necessity to protect the wife's separate property from forced sale, because it was secure by reason of its being *her* separate property, there being therefore no necessity of including it within the intent of the homestead law.⁴

In *Gee v. Moore* the court said : " Neither the Constitution nor the statute recognizes any estate in the wife ; on the contrary, it is clear that both were framed upon the idea that it was out of the property of the husband, or at best out of the common property, that the homestead was to be carved. It is the homestead and other property of the *head* of the family, which is by the Constitution, to be protected from forced sale."⁵

¹ *Bishop v. Hubbard*, 23 Cal. 518.

² *Post*.

³ *Taylor v. Hargous*, 4 Cal. 273; *Revalk v. Kraemer*, 8 Cal. 71; *Gee v. Moore*, 14 Cal. 474; *Bowman v. Norton*, 16 Cal. 217; *Riley v. Pehl*, 23 Cal. 70.

⁴ *Revalk v. Kraemer*, 8 Cal. 71; *Riley v. Pehl*, 23 Cal. 70.

⁵ *Gee v. Moore*, 14 Cal. 474.

The Act of 1860¹ allowed the selection to be made by either the husband or wife, instead of by the owner only, as under the Act of 1851.² The court accordingly, in *Barker v. Babil*, said: "We see no objection to either devoting his, or *her*, own separate property or the common property, to such an object."³

Section 4 of the Act of 1862 provided that the land, on the death of either the husband or wife, should vest in and be held by the survivor as it was held by the deceased before death.⁴ This implies that the homestead could be carved out of the separate estate of the wife.

(b) *Under the Code*.—Section 1238, Civil Code, as first enacted, provided as follows: "It may be selected by the claimant from *any* land in the possession of the claimant or of the husband of the claimant."

This would include land held in undivided interest as well as that held in severalty.

Section 1238, as amended in 1874, provides: "If the claimant be married, the homestead may be selected from the community property, or with the consent of the wife, from her separate property."⁵

When the claimant is not married, but is the head of a family, within the meaning of section 1261, the homestead may be selected from any of his or her property."⁶

Section 1239, Civil Code, as first enacted, provided as follows: "The husband can not select a homestead from the separate property of the wife."

¹ *Ante*.

² *Ante*.

³ *Barber v. Babel*, 36 Cal 18.

⁴ *Post*.

⁵ *Schuler v. Sav. & L. Soc.*, 1 West Coast Reporter, 125.

⁶ *Ante*.

Section 1239, as amended in 1874, provides: "The homestead can not be selected from the separate property of the wife without her consent, shown by her making, or joining in making, the declaration of homestead."¹

(4) *Buildings*.—The homestead right can not attach to a building independent of the land on which it is situated.²

Texas.—A homestead may be the separate property of the husband, the community property of the husband and wife, or the separate property of the wife.³

It may be established on property held in an undivided interest; but not to prejudice the rights of a cotenant. The property upon which a homestead is established may be partitioned, if a partition is possible and consonant with the rights of all parties: if it is so incapable of partition, it may be sold and the proceeds divided.⁴

§ 69. Title to land upon which there is a homestead.—*California*.—The statute says nothing about title. The homestead right given by the statute is impressed on the land to the extent of the interest of the claimant in it,

¹ *Nevada*.—"If the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration; and if such property shall retain its character of separate property until the death of one or the other of such spouses, then and in that event the homestead rights shall cease in and upon said property, and the same belong to the party (or his or her heirs) to whom it belonged when filed upon as a homestead." (Stats. 1879, p. 141.)

² *Smith v. Smith*, 12 Cal. 216.

³ *Battle v. John*, 49 Tex. 211; *Ball v. Lowell*, 56 Tex. 583.

⁴ *Williams v. Wethered*, 37 Tex. 130; *Smith v. Deschaumes*, 37 Tex. 429; *Clements v. Lacy*, 51 Tex. 161; *Jenkins v. Volz*, 54 Tex. 639; *Clift v. Kaufman*, 60 Tex. 64; *Pressley v. Robinson*, 57 Tex. 453; *Gilliam v. Null*, 58 Tex. 304.

not on the title merely. The land is impressed with the homestead as against everybody who has not a better title. Whatever title the claimant may have is protected from forced sale.

As against creditors this possession of the land is as much protected by the homestead law, as if the claimant were vested with the fee simple. In the solution of all questions arising between homestead claimants and creditors, the absence of title is a false quantity, which must be excluded from the consideration.¹

Texas.—The California rule obtains in Texas. Parties may establish a homestead upon land which they hold by a mere equitable title, but they can not subordinate the legal title to their mere equitable right. Their homestead right is dependent on their title, and must stand or fall with it.² But creditors can not avail themselves of any question of title. As to them the homestead right attaches, independent of the title.³

§ 70. Conveying or incumbering the homestead.—*California.*—(a) *Before the Code.*—The Act of 1851⁴ provided as follows: "But no mortgage, sale, or alienation of such land by the owner thereof, if a married man, shall be valid unless signed by the wife, and acknowledged by her separately and apart from her husband, provided that the wife be a resident of this State,⁵ and that such signature and acknowledgment shall not be

¹ *Spencer v. Gerissman*, 37 Cal. 96; *Brooks v. Hyde*, 37 Cal. 373 (this case distinguishes *Calderwood v. Tevis*, 23 Cal. 335, which seems to hold *per contra*).

² *Pepper v. Smith*, 54 Tex. 118.

³ *Post*.

⁴ *Hittell's General Laws*, 3542; *Stats.* 1850-3, p. 850.

⁵ *Cary v. Tice*, 6 Cal. 630; *Rix v. McHenry*, 7 Cal. 89; *Benedict v. Bunnell*, 7 Cal. 245; *Gambette v. Brock*, 41 Cal. 83.

necessary to the validity of any mortgage upon the land executed before it became the homestead of the debtors,¹ or executed to secure the payment of the purchase money."²

Under this statute any mortgage or conveyance of the homestead, for any purpose, could be made by a married man, it being necessary only that the wife should join in the execution of the mortgage or deed, if she were a resident of this State. The homestead could be mortgaged to secure a loan or for any other purpose.³

Land on which the purchase money was due could become impressed with the character of a homestead, the homestead right being subordinate to any existing lien for the purchase money. The husband could not alone after the homestead right had attached charge the land with interest on this purchase money.⁴

When a third party advanced the money to pay off a mortgage on the homestead given to secure the purchase money, and took a new mortgage to secure his loan, it was held that the money advanced was equivalent to so much purchase money, and that the second mortgage was therefore valid.⁵

A conveyance or mortgage of the homestead by the husband *alone* was *absolutely void*, if the homestead was of less value than five thousand dollars, and was void to the extent of that sum if it was worth more;⁶ and,

¹ Kellersberger v. Kopp, 6 Cal. 563; Swift v. Kraemer, 13 Cal. 530.

² *Post*.

³ Cohen v. Davis, 20 Cal. 187; Gluckauf v. Blinn, 23 Cal. 314; Peterson v. Hornblower, 33 Cal. 272.

⁴ McHendry v. Reilly, 13 Cal. 76.

⁵ Carr v. Caldwell, 10 Cal. 380.

⁶ Taylor v. Hargous, 4 Cal. 273; Sargent v. Wilson, 5 Cal. 507; Poole v. Gerrard, 6 Cal. 71; Dorsey v. McFarland, 7 Cal. 342; Revalk v. Kraemer, 8

therefore, it was held that a contract by a married man for the sale and conveyance of land was not, if the premises were occupied by the man and his wife as a homestead, fulfilled by the tender of a conveyance executed by himself alone.¹

These decisions were based upon the theory that the homestead was a sort of joint tenancy. Subsequently, when the theory of joint tenancy had been abandoned,² and it was held that the estate in the homestead (it having been his separate or community property), remained in the husband, a conveyance or mortgage by the husband alone was *valid*, but was taken subject to the right of the family to remain in the occupancy of the premises so long as they maintained the character of a homestead. The estate vested where it existed before the premises were appropriated as a homestead.

In *Gee v. Moore* the court said: "The Constitution only requires legislation exempting the property from *forced sale*." It does not look to legislation in restraint of voluntary alienation. The statute goes beyond the constitutional provision. It not only exempts the homestead from *forced sale*, but declares that no mortgage, sale, or alienation of any kind, by the owner, if a married man, shall be valid without the signature and acknowledgment of the wife, if she be a resident of the State. Neither the Constitution nor the statute recognize any estate in the wife; on the contrary, it was clear that both were framed upon the idea that it was not out of the property of the husband, or, at least, common prop-

Cal. 66; *Van Reynegan v. Revalk*, 8 Cal. 75; *Cook v. Klink*, 8 Cal. 347; *Dunn v. Tozer*, 10 Cal. 167; *Moss v. Warner*, 10 Cal. 296; *Estate of Tompkins*, 12 Cal. 114; *Lies v. De Diablar*, 12 Cal. 327; *McQuade v. Whaley*, 31 Cal. 531.

¹ *Clarkin v. Lewis*, 20 Cal. 634.

² *Post*.

erty, that the homestead was to be carved. It is the homestead . . . of the *head* of the family, which is by the *Constitution* to be protected from forced sale. It is the alienation by the *owner*, if a married man, which the *statute* declares shall be invalid without the signature of the wife. The power of alienation and not the nature of the husband's estate, is thus affected."¹

In *Bowman v. Norton* the court, besides affirming the above doctrine, held that the homestead right might be released or abandoned, but could not be transferred. The restraint upon the husband's power of alienation was the personal right of the wife alone.

The wife's signature and acknowledgment were not necessary to any mortgage, sale, or alienation of the homestead, under either of these theories, when given to secure the *purchase money*.²

In 1860 the Act of 1851 was amended so as to read as follows: "But no mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness upon the homestead property, shall be valid *for any purpose whatever*; provided, that a mortgage or alienation to secure or pay the purchase money, shall be valid if the signature of the wife be obtained to the same, and acknowledged by her separately and apart from her husband."³ This amendment prohibited any mortgage or alienation of the homestead to secure a loan or for any purpose other than to secure the payment of

¹ *Gee v. Moore*, 14 Cal. 474; *Bowman v. Norton*, 16 Cal. 213, *McQuade v. Whaley*, 31 Cal. 534.

² *Dillon v. Byrne*, 5 Cal. 455; *Lassen v. Vance*, 8 Cal. 275; *Carr v. Caldwell*, 10 Cal. 386; *Montgomery v. Tutt*, 11 Cal. 193; *Williams v. Young*, 17 Cal. 406; *Skinner v. Beatty*, 16 Cal. 157, *post*.

³ *Stats.* 1860, p. 311. *Nevada*—Compiled Laws, 187 (same as in California).

the purchase money, even with the consent of the wife.¹ In 1862 it was again amended so as to read as follows: "No alienation, sale, conveyance, mortgage, or other lien of or upon the homestead property, shall be valid or effectual, for any purpose whatever, unless the same be executed by the owner thereof, and be executed and acknowledged by the wife, if the owner be married and the wife be a resident of the State, in the same manner as provided by law in the case of a conveyance by her of her separate and real property. For the purpose of making or creating such alienation, sale, conveyance, mortgage, or lien, as aforesaid, it shall not be necessary that the declaration of abandonment of the homestead be executed as herein provided for, nor that the homestead property be actually abandoned."²

This amendment restored the law as first enacted, allowing the homestead to be sold or mortgaged for any purpose, provided the wife joined in the execution of any such conveyance or mortgage. Under the Act of 1860 the homestead had to be abandoned before it could be sold. Under this Act it could be sold without any prior abandonment.³

After the passage of the Act of 1860, declaring that the homestead was held in joint tenancy, the original rule was restored that the husband could not, by his acts alone, affect the interests of his wife therein.⁴

¹ *Sears v. Dixon*, 33 Cal. 326; *Himmelmann v. Schmidt*, 23 Cal. 120.

Nevada.—In *Dunker v. Chedic*, 4 Nev. 381, this prohibition was held to be in conflict with the constitutional provision expressly allowing a forced sale of the homestead under liens created by the joint act of husband and wife. (Art. IV, § 30.)

² Stats. 1862, p. 519.

³ *Peterson v. Hornblower*, 33 Cal. 272.

⁴ *Barber v. Babel*, 36 Cal. 14; *Flege v. Garvey*, 47 Cal. 376.

This rule finds forcible application when the husband attempts alone to substitute a new mortgage for an old one.¹

Where a creditor, holding a mortgage on the homestead for the purchase money, loaned an additional sum, took a new note and mortgage for the entire indebtedness and canceled the former mortgage, the second mortgage was held to be valid to the extent of the original indebtedness only.

In *Swift v. Kraemer*,² and *Himmelmann v. Schmidt*,³ where a mortgage, executed before the homestead right attached, was canceled, and a new note and mortgage, covering the original indebtedness and an additional loan, was executed by the husband alone, after the homestead right attached, the whole being one transaction, it was held that a court of equity would uphold the second mortgage to the extent of the original indebtedness, treating it as "not creating a new incumbrance, but simply changing the form of the old."

In *Barber v. Babel*,⁴ these two cases were, in fact, overruled, although the court attempted to distinguish them by holding that in *them* there was no question under the Statute of Limitations, whereas in the case at bar the old note and mortgage were outlawed when the suit was begun to foreclose the new mortgage executed by the husband alone; that in *them* the upholding of the new mortgage (to the extent of the old one) created no new lien, whereas in *Barber v. Babel* the upholding of the new mortgage at the time of the action

¹ *Dillon v. Byrne*, 5 Cal. 457.

² *Swift v. Kraemer*, 13 Cal. 530.

³ *Himmelmann v. Schmidt*, 23 Cal. 120.

⁴ *Barber v. Babel*, 36 Cal. 14.

would have created a new lien, which could not be done by the act of the husband alone.

(b) *Since the Code*.—Section 1242, Civil Code, provides that “the homestead of a married person can not be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife.”

Neither can act in this matter through an attorney. “The law is imperative that the alienation of the homestead must be by the *personal* act of the husband and wife. . . . Whether the alienation or abandonment of the homestead would be for the interest of the family is for the husband and wife to determine . . . No third person, whether acting as attorney for either or for both, can determine that question for them, and their will in that regard must be manifested by their joint act, expressed by their *personal* signatures, and *personally* acknowledged by them.”¹

Sale, in case of the lunacy, civil death, or imprisonment of either husband or wife.—There is no express provision in the statute in respect to the alienation or disposition, in any manner, of the homestead, in case of the lunacy, civil death, or imprisonment of either husband or wife. The statute requires the conveyance of the homestead to be executed by both husband *and* wife, if she be a resident of the State. A sale, therefore, by the guardian of the husband, under the order of the Probate Court, is void, even though the court appointed an attorney to represent the wife, and this attorney consented to the sale. The signature of the wife can not be dispensed with.²

¹ *Gagliardo v. Dumont*, 54 Cal. 500.

² *Flege v. Garvey*, 47 Cal. 371.

Fraud.—The homestead law was enacted for beneficent purposes, to secure a home for the family, not as “a secure and impregnable asylum in which to deposit speculations from others.” It was accordingly held in *Shinn v. Macpherson*,¹ when a member of a firm secretly and surreptitiously withdrew from the assets of the firm (there being nothing due him from the firm) money with which he paid off and discharged a mortgage lien on his homestead, that the lien was restored for the amount so paid by him.

A creditor of the husband furnished the money to a third party to purchase in his own name (but really for the creditor) certain property on which the debtor and his wife had a homestead, the deed was executed by the debtor and his wife and delivered to the apparent purchaser and by him immediately recorded, and the money (by collusion between him and the real purchaser, the creditor,) was attached in his hands. The wife had given her signature to the conveyance upon the understanding that the purchase money was to be paid. As the attachment and non-payment were due to the fraud of the real purchaser, the deed was canceled as in fraud of the homestead rights of the wife.²

Texas.—The following is the constitutional provision : “Nor shall the owner, if a married man, be at liberty to alienate the same, unless by consent of the wife, in such manner as the legislature may hereafter point out.”³ Such consent shall be evidenced by the wife joining in the conveyance, signing her name thereto, and separate-

¹ *Shinn v. Macpherson*, 58 Cal. 598.

² *Still v. Saunders*, 8 Cal. 286.

³ Const. 1876, Art. XVI, § 50; Const. 1869, Art. XII, § 16; Const's 1866, 1861, 1845, Art. VII, § 22.

ly acknowledging the same as in all her conveyances.¹

A sale of the homestead by the husband, without the consent of the wife given in the manner required by law, is a nullity.² A sale by the husband alone of a tract of land containing more than two hundred acres, but on which there is a homestead, is good only as to the excess over two hundred acres.³

If authority is given, prior to marriage, to an agent to sell the homestead, a sale made by this agent after the marriage of his principal, is not valid unless the wife join in the conveyance.⁴

A man, unmarried, resided with his slaves upon a tract of land. In 1861 he joined the Confederate army, leaving an agent in charge of the place, with a power of attorney to sell it. During his absence in Alabama he married, intending to return to Texas. In 1863 he returned to Texas, and, at the close of the war, his wife followed him. Prior to her arrival the land had been sold under the said power of attorney. He had not resumed his residence upon it after his return, because of his ill health. It was held that the husband's absence in the army did not amount to an abandonment of his homestead, and that the wife, upon her marriage, acquired homestead rights in Texas, and that, therefore, the sale of the homestead without her consent was invalid.⁵

¹ Rev. Stats. 560.

² *Norris v. Duncan*, 21 Tex. 596; *Cross v. Everts*, 28 Tex. 533; *Moore v. Whitis*, 30 Tex. 443; *Morrill v. Hopkins*, 36 Tex. 687; *Rogers v. Renshaw*, 37 Tex. 625; *Kirkland v. Little*, 41 Tex. 456; *Houston and G. N. R. R. Co. v. Winter*, 44 Tex. 611; *Whetstone v. Coffey*, 48 Tex. 272; *Hair v. Wood*, 58 Tex. 79.

³ *Battle v. John*, 49 Tex. 211; *Whetstone v. Coffey*, 48 Tex. 272.

⁴ *Henderson v. Ford*, 46 Tex. 631.

⁵ *Henderson v. Ford*, 46 Tex. 631.

Although a power to sell, given before marriage, would be revoked by the marriage, yet if, in fact, before the marriage, the property had been abandoned as a homestead, and had been sold or incumbered, the subsequent marriage would not render the transaction invalid.¹

The restriction against the voluntary alienation or incumbrance of the homestead, as such, by the husband alone, without the consent of the wife, has been relaxed in favor of vendor's liens, upon the principle that the title is not acquired until the purchase money has been paid.²

The husband may make a gift to his wife of his interest in the homestead, or of the proceeds of the sale of the homestead (before the sale is made),³ or he may convey it to her by a *bona fide* sale,⁴ and in neither case can creditors complain, because the conveyance does not affect property that they could subject to their claims.⁵ Any agreement made by husband and wife concerning the homestead is valid as to them,⁶ but a sale by the husband to the wife, which is not intended to pass title, is invalid as to creditors, and the land, when disrobed of its homestead character by abandonment or otherwise, would be subject to their claims.⁷

A purchaser of real property from a married man must take notice of the fact that the vendor has a wife and also that the land or a part thereof is a homestead.⁸

¹ *Jordan v. Imthurn*, 51 Tex. 288.

² *Gaylord v. Loughridge*, 50 Tex. 576, *post*.

³ *Allen v. Hall*, Tex. Court of Appeals (Civil Cases), § 1279.

⁴ *Baines v. Baker*, 60 Tex. 139.

⁵ *Post*.

⁶ *Montgomery v. Brown*, Tex. Court of Appeals (Civil Cases), § 1305.

⁷ *Baines v. Baker*, 60 Tex. 139.

⁸ *Tadlock v. Eccles*, 20 Tex. 792; *Houston and G. N. R. R. Co. v. Winter*, 44 Tex. 611; *Whetstone v. Coffey*, 48 Tex. 277.

But, though a conveyance of the homestead by the husband, without the consent of the wife, is inoperative, yet *she alone* can assert her rights against such a conveyance.¹

A contract made by a married man, without the consent of his wife, for the sale of the homestead, is a valid contract as far as he is concerned, because, if the homestead is abandoned, or (it being *his* separate property) the wife die, he would have the right to sell. If suit is brought upon such a contract against him and decided during the life of his wife, damages only can be recovered for his failure to convey. If, however, suit is brought after the death of his wife, or, though brought during her life, is not tried until after her death, a specific performance may be decreed.²

Fraud.—The wife is not necessarily estopped by a letter of her's assenting to a sale of the homestead by her husband, as she may have supposed that the sale would be consummated according to law.³

The fraudulent declarations or conduct of the husband, to which the wife is not privy, will not be held in equity to pass the title to the homestead, or to create any charge upon it which the husband could not make by deed. The fraud of the husband will not bar its recovery for the use of the family. To do this there must be fraud on the part of both husband and wife, for which no other adequate redress can be found.⁴

The mere declarations of the husband, or of third parties, though ever so fraudulent, if false, do not bar

¹ *Hair v. Wood*, 58 Tex. 79.

² *Primm v. Barton*, 18 Tex. 206; *Brewer v. Wall*, 23 Tex. 587; *Allison v. Shilling*, 27 Tex. 450; *Wright v. Hays*, 34 Tex. 261.

³ *Eckhardt v. Schlecht*, 29 Tex. 132.

⁴ *Eckhardt v. Schlecht*, 29 Tex. 133.

or prevent the assertion of the homestead exemption by the husband and wife. Nor will the declarations of the wife, nor her written recognition and ratification of the previous deed of her husband not in conformity with the statute regulating conveyances by married women, but which are not shown to have misled the parties claiming under the deed from her husband, estop her from asserting her homestead rights.¹

A man and his wife resided upon certain land as a homestead. As they did not live together very happily, they agreed to separate and divide the property, which they did, the husband taking the homestead. Subsequently the husband sold the homestead, the wife at the time disclaiming any ownership therein. After the separation she had no settled home or a homestead. She subsequently brought suit for the homestead and recovered it, the court saying: "The constitutional provision that the owner of a homestead, if a married man, shall not be permitted to alienate it without the consent of the wife, in the way pointed out by the legislature, is disregarded for the protection of the wife, inasmuch as by her consent, in the manner pointed out by the legislature, the homestead can be conveyed as well as any other property. But the wife can not invoke the constitutional provision for any other purpose than for what it was intended to subserve; at least she can not use it as a means to defraud others.

"Though the Constitution and laws point out the method of the conveyance of a homestead, and though the statute also directs the registration of conveyances of real estate, in order that all persons may be able to

¹ Thomas v. Williams, 50 Tex. 275.

act advisedly thereon and have proper information relative to the claims thereto of any supposed owner or claimant, yet owners can 'do some acts which the policy of the law will not permit them to gainsay or deny.' *A married woman, evidently free from all restraint and with a full knowledge of her rights, who should represent that a certain tract of land was not her homestead, and thus cause a person to purchase it, would be concluded by her acts;* but if the party purchasing should know all the facts, or by reasonable diligence could know, and if it should be apparent that the married woman was not entirely free from restraint or was not cognizant of her rights, whatever admissions might be made under these or similar circumstances could not with any propriety be said to influence the purchaser or estop the married woman from asserting her rights. These admissions, whether of law or fact, which have been acted on by others, and which were deliberately and knowingly made, are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced.

"The marriage relation can not be dissolved by the voluntary act of the husband and wife. The good of society and its interests and duties devolve on every member thereof. Laws framed for these interests prescribe the method of divorce, and, until the husband and wife are divorced, either by a proper legal tribunal or by death, their relations as such remain; *and while this connection exists, there is only one way whereby a wife can convey her interests to a homestead.*

"For the very reason that a husband, by persuasions or intimidations, by love or by fear, or any other conduct, may cause a wife to utter certain declarations

detrimental to her interests, the statute requires that, after the husband and wife have signed and sealed any deed or other writing purporting to be a conveyance of the homestead of the family, if the wife appear before any judge of the supreme or district court or notary public, and, being privily examined by such officer apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed so again shown to her to be her own act, then a certificate thereof shall be made by the officer, and it shall be a valid conveyance. A declaration made by a wife, based upon the fact that the conduct of her husband was such that her own self-respect forbade the occupancy of the same house with him, would be very far from a legal conveyance of her husband, whatever this declaration might be. Whoever, knowing the facts, should purchase the homestead, could not be regarded an innocent purchaser.

“In *Young v. Benthuisen*, decided at the last term of this court (30 Tex. 762), the facts, as appeared by a special verdict of a jury, were that Mrs. Young and her husband had conveyed the homestead by deed of trust, authorizing the trustee to sell, after advertising the property twenty days; that Mrs. Young was present at the sale, and did not object to or forbid the same; and that Mrs. Young requested the purchaser at the trustee's sale to sell the property to Mrs. Van Benthuisen, and that Mrs. Van Benthuisen did not purchase in good faith.

“In that case, as in this, the principal defense set up was that the married woman was estopped by her asser-

tions. The court, in that case, said: 'To give the most claimed by the defendant, this advice or request could not operate more favorably for the defendant or more adversely to plaintiffs than if Mrs. Young had then and there executed a deed for the lots to defendant. But a deed made by a married woman for land, even if the land had been her own, would not have passed the title unless it were acknowledged before a proper officer, according to the statute in such cases made and provided.' 'The Constitution and laws have so hedged in a homestead from sale that courts are required to scrutinize very closely to see that all the constitutional requirements have been fully complied with before they will pronounce a sale of the same to be valid.'

"The case before the court has a great resemblance to the one from which we have quoted. In both cases a married woman disclaimed ownership in the homestead in presence of the purchasers, and in both cases the purchasers were fully apprised that the married women had not been legally divested thereof. In both cases the women may have made admissions in ignorance of their legal rights, and it is certain that the admissions made by the married women in both cases could not be the cause of the actions of the purchaser. No one of ordinary prudence purchases real estate without an exhibit of the title, and this exhibit furnishes by itself all the required evidence of its validity. It is claimed, in the case before the court, that the wife, after separation, sold to the husband, and so acknowledged to the purchaser from the husband.

"But it must be recollected that the husband and wife can not by their own separate or united will dissolve

their marital relations; that the wife can not sell to the husband; and that the pretended sale to the husband was a sale to herself as the wife and was ineffectual for any purpose; that if it was the homestead of the husband, it was the homestead of the wife.

"The husband may have sold the homestead with the consent of the wife, but, inasmuch as the consent was not given 'in such manner as the legislature has pointed out,' and as it does appear that the appellant (purchaser) was acquainted and fully apprised of all the facts in the case, and was not influenced, in making the purchase, by the admissions of the wife, the judgment is affirmed."¹

If the wife sign a conveyance of the homestead under threats of being abandoned by her husband, her act is void.²

A conveyance of the homestead by the husband, without the consent of the wife, is inoperative, but she alone can assert her rights against such a conveyance.³

§ 71. Forced sale of the homestead.—*California*.—The Constitution provides as follows: "The legislature shall protect by laws from *forced sale* a certain portion of the *homestead* and other property of all heads of families."⁴

¹ The Homestead Cases, 31 Tex. 677.

² Kocourek v. Marak, 54 Tex. 202.

³ Hair v. Wood, 58 Tex. 79.

⁴ Const. 1849, 1863, § 15, Art. XI; Const. 1879, § 1, Art. XVII.

Nevada.—"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempted from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon; *provided*, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife; and laws shall be passed providing for the recording of such homestead within the county in which the same shall be situated." (Art. IV, § 30.)

The Constitution is inoperative of itself, and looks to legislation, and, in acting upon the subject, it is entirely within the discretion of the legislature to determine how far, and in what manner the homestead should be protected from forced sale.¹

(a) *Before the Code.*—The Act of 1851 provided as follows: "The homestead . . . shall not be subject to *forced sale on execution or other final process* from a court, for any debt or liability contracted or incurred after thirty days from the passage of this Act, or if contracted and incurred at any time in any other place than this State. Such exemption shall not extend to any mechanic's, laborer's, or widow's lien, or to any mortgage lawfully obtained."²

In 1862 this was amended so as to make the last clause read as follows: "Such an exemption shall not extend to any mechanic's, laborer's, or widow's lien, lawfully obtained, nor to any mortgage or other lien, lawfully taken or acquired, to secure the purchase money for said homestead."³ By this amendment there could be no forced sale for any mortgage unless it was given to secure the purchase money.

¹ Cary v. Tice, 6 Cal. 630.

² Stats. 1851, 296.

³ Stats. 1862, p. 519; Hittell's General Laws, 3542; Nevada.—Compiled Laws, 187.

Nevada.—The law makes no reservation in favor of liens acquired *before* the dedication of the homestead, and the homestead is therefore free from the lien of an attachment levied prior to such dedication. (Hawthorne v. Smith, 3 Nev. 193; Const. Art. IV, § 30). The homestead right can not be acquired as against the purchase money (Hopper v. Parkinson, 5 Nev. 233), nor can it exempt property from sale for taxes. (Compiled Laws, 189.) It is subject to forced sale under process to enforce the payment of the purchase money for such premises, or for improvements made thereon, or for legal taxes imposed thereon, or for the payment of any mortgage thereon, executed and given by both husband and wife, when that relation exists. (Stats. 1879, p. 140.)

A "*forced sale*" is not synonymous with a "*sale on execution.*" The latter may be and often is voluntary in every respect. Its quality, as being voluntary or forced, depends not upon the mode of its execution, but upon the presence or absence of the consent of the owner. "Forced sale" means a sale against the will of the owner. Where the owner of the homestead consents to a sale under execution or other legal process, it is not a forced sale. It makes no difference in respect to its being forced or voluntary, whether he consents directly to the sale, or does the same indirectly by consenting to or doing those acts or things that necessarily or usually eventuate in a sale. A foreclosure sale, whether under the power of sale contained in the mortgage or in pursuance of a decree, is not a forced sale within the meaning of the Constitution or the statute.¹

(b) *Since the Code.*—The legislature seems to have not noticed the distinction between "*execution*" and "*forced sale*," as announced in *Peterson v. Hornblower*, and to have treated them as synonymous. The distinction does not have any practical importance, in view of the specific provisions of the Code.

Section 1240, Civil Code, provides that "the homestead is exempt from *execution* or *forced sale*, except as in this title provided."

Section 1241, Civil Code, provides that "the homestead is subject to execution or forced sale in satisfaction of *judgments* obtained :

"(1) Before the declaration of homestead was filed for record, and which constitute liens upon the premises, [originally read 'upon the land out of which the homestead is carved.']

¹ *Peterson v. Hornblower*, 33 Cal. 276.

"(2) On debts secured by mechanics', laborers', or vendors' liens upon the premises, [originally read 'on the land.']

"(3) On debts secured by mortgages upon the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant.

"(4) On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record."¹

Unless a judgment is secured as above mentioned, it does not become a lien upon the homestead, as it can only become a lien upon the real property of the judgment debtor "not exempt from execution."²

This is true of a judgment obtained *after* the filing of the declaration of homestead, even though an attachment may have been levied on the property *prior* to the filing of such declaration.³

If, while a judgment is standing against the husband, the husband and wife make a sale of the homestead, and at the same time, make a relinquishment of the homestead right in the manner required by law, the two acts constituting one transaction, the lien of the judgment would not attach to the homestead. If the relinquishment of the homestead right took effect before the sale, the judgment lien would attach.⁴

When a declaration of homestead is filed and recorded between the rendering of a judgment *in personam* and a decree foreclosing a mortgage, and the dock-

¹ *Graham v. Oviatt*, 58 Cal. 430.

² *Ackley v. Chamberlain*, 16 Cal. 181; *Bowman v. Norton*, 16 Cal. 214; *Williams v. Young*, 17 Cal. 403.

³ *McCracken v. Harris*, 54 Cal. 81; *Sullivan v. Hendrickson*, 54 Cal. 258; *Wilson v. Madison*, 58 Cal. 2.

⁴ *Marriner v. Smith*, 27 Cal. 650.

eting of the balance of the judgment after the sale of the mortgaged property, the judgment lien does not attach, as, in such a case, this judgment *in personam* does not become a lien on the real property of the judgment debtor until the mortgaged property has been sold by the sheriff, and the balance, if any, reported and docketed by the clerk, and then only for such balance.¹

If the homestead should be sold on execution, the sheriff's deed would convey nothing.² It would, probably, be somewhat of a cloud on the title, which could easily be cleared up.³ A notice to the sheriff before the sale that the property about to be sold is a homestead would not affect the sale. Such a notice is not even evidence of the existence of the homestead.⁴

Texas.—The Constitutions of 1845, 1861, and 1866 provided as follows: "The homestead of a family . . . shall not be subject to *forced sale* for any debts hereafter contracted."⁵

In *Campbell v. Elliott* (52 Tex. 160) the court say, construing the Constitution of 1845: "We are of opinion that it was intended by this language to so absolutely prohibit *forced sales* of the homestead as to render them invalid and ineffectual in and of themselves, without further act of parties, to convey any legal right."⁶

The Constitution of 1869 contained this provision: "The homestead of a family . . . shall not be

¹ *Culver v. Rogers*, 28 Cal. 520; *Hershey v. Dennis*, 53 Cal. 80.

² *Kendall v. Clark*, 10 Cal. 17; *Ackley v. Chamberlain*, 16 Cal. 181; *McDonald v. Badger*, 23 Cal. 401; *Deffeliz v. Pico*, 46 Cal. 289.

³ *Dunn v. Tozer*, 10 Cal. 172; *Pixley v. Huggins*, 15 Cal. 133; *Riley v. Pehl*, 23 Cal. 72; *Marriner v. Smith*, 27 Cal. 653.

⁴ *Villa v. Pico*, 41 Cal. 469.

⁵ Art. VII, § 22.

⁶ *Campbell v. Elliott*, 52 Tex. 160.

subject to *forced sale* for debts, except they be for the purchase thereof, for the taxes assessed thereon, or for labor and materials expended thereon.”¹

The Constitution of 1874 provided as follows : “The homestead of a family shall be, and is hereby protected from *forced sale*, for the payment of all debts, except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and materials used in constructing improvements thereon, and in the last case only when the work and materials are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead.”

“No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, trust deed, or other lien shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void.”²

Prior to the Constitution of 1876 the homestead, by deed of trust duly executed, could be made security for an indebtedness other than the purchase money.

After the Constitution of 1876 this could not be done, section 50, Art. XI thereof providing that “no mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinafter provided, whether such mortgage or trust deed or other lien shall have been created by the husband alone, or *together*

¹ Art. XII, § 15.

² Art. XVI, § 50.

with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void.”¹

The constitutional provision requires no aid from the legislature.² The legislature has, however, enacted as follows: “The homestead is exempt from attachment or execution, and from every other species of forced sale for the payment of debts, except where the debt is due (1) for the purchase money of such homestead or a part of such purchase money;³ (2) for taxes due thereon;⁴ and (3) for work and material used in constructing improvements thereon.

“But in order to fix a lien upon the homestead for lumber or material furnished, labor performed, erections or repairs made thereon, it is the duty of persons, mechanics, artisans, lumber dealers, and laborers, who perform labor or furnish any material upon or about the construction of any improvement or repairs upon a homestead, to make and enter into a contract in writing, setting forth the terms of said contract, which said contract in writing must be signed by the husband and wife and acknowledged by her, as required in making a sale of the homestead, at the time when such improvement and repairs are made, or material furnished, or labor performed, and all such contracts must be recorded in the county clerk’s office, in the county where such improvements are being made or such land is situated.”⁵

¹ *Jordan v. Peak*, 38 Tex. 429; *Arto v. Maydole*, 54 Tex. 246; *Sampson v. Williamson*, 6 Tex. 102; *Lee v. Kingsbury*, 13 Tex. 71; *Stewart v. Mackey*, 16 Tex. 58; *Bomback v. Sykes*, 24 Tex. 217.

² *The Homestead Cases*, 31 Tex. 879.

³ *Post*.

⁴ *Lufkin v. Galveston*, 58 Tex. 545

⁵ *Rev. Stats.* 2335, 2341, 2007, 3174.

*A homestead can not be acquired as against a vendor's lien.*¹—No portion of land is reserved from this lien by the payment of a portion of the purchase money, this lien being upon the whole land.² Where the purchase money is not paid, and a homestead is set apart out of the property by the Probate Court, the holder of the vendor's lien can foreclose his lien notwithstanding such action of the court.³ A homestead is not exempt from forced sale under a note and mortgage given to pay off the purchase money for which it was about to be sacrificed.⁴ While the lots are incumbered by the lien of the purchase money, the husband can make any arrangement in relation to such an incumbrance or he may renounce the land to the holder of the lien, without the consent of the wife.⁵

Advances by a third party to pay purchase money.—The rule at first obtained that if a third party advanced the money to relieve the homestead from the burden of the vendor's lien, he was not thereby subrogated to the rights of the vendor, even though such was the intention of all the parties, and the homestead could not therefore be subjected to a forced sale on account of his loan. In *Malone v. Kaufman*, where such a state of facts occurred, the court said: "The moment the

¹ *Claybrooks v. Kelly*, 61 Tex. 634.

² *Stone v. Darnell*, 20 Tex. 11; *White v. Shepperd*, 16 Tex. 173; *Macmanus v. Campbell*, 37 Tex. 269; *Farmer v. Simpson*, 6 Tex. 310; *McCreery v. Fortson*, 35 Tex. 649; *Lacy v. Clements*, 36 Tex. 663; *Burford v. Rosenfield*, 37 Tex. 45; *Clements v. Lacy*, 51 Tex. 150; *DeBruhl v. Maas*, 54 Tex. 473; *Perego v. Kottwitz*, 54 Tex. 501. *Nevada*.—*Hopper v. Parkinson*, 5 Nev. 233.

³ *Wahrmund v. Merritt*, 60 Tex. 24.

⁴ *Hicks v. Morris*, 57 Tex. 662 (*Malone v. Kaufman*, 38 Tex. 454, overruled).

⁵ *Claybrooks v. Kelly*, 61 Tex. 634.

money was paid to the holder of the purchase-money notes, no matter whence derived, the purchase money was paid, the vendor's lien on the lot was discharged, and the deed of trust for Hughes, the vendor, became null. Had Kaufman (the third party) dealt with the holder of the purchase-money notes, paid his money to him as the purchaser of the notes, the vendor's lien would have inured to him as an incident to the notes. But he saw fit to make a new contract, to deal with Malone (the homestead claimant) and not with the holder of the notes; and, consequently, the new contract, not being for *purchase money*, but for *money loaned*, is not such an one as can subject the homestead to forced sale, whatever may have been the *intention* of the parties to the contract at the time."¹

This rule is now changed, and one who advances the money to remove the vendor's lien from the homestead is subrogated to the rights of the vendor. In *Hicks v. Morris*, *Malone v. Kaufman* was overruled. In this case Morris wished to purchase certain premises from Hart, and obtained from Hicks the money to pay Hart, giving Hicks his note and a mortgage upon the land. Subsequently this note was renewed for a larger sum. The property became the homestead of Morris. It was held that Hicks was subrogated to the lien of Hart for the purchase money, and the court said: "The constitutional prohibition of a forced sale of the homestead was designed to protect it, not to compel its sacrifice. A sacrifice might be the result, if, when the homestead is about to be subjected to a valid lien, the husband and wife could not utilize

¹ *Malone v. Kaufman*, 38 Tex. 457.

the homestead as a security by means of which to raise money to pay off the old incumbrance."¹

A deed of trust was made upon certain land before it became a homestead. By an arrangement between all the parties, after the homestead right had attached, a new deed of trust was given to a third party who advanced the money to pay off the debt secured by the first deed. It was held that this new lien was subrogated to the old one, and was therefore not affected by the homestead.²

A man purchased certain land from an estate. An arrangement was made by all the parties interested, that the said purchaser should execute to certain creditors of the said estate his promissory notes for the purchase money and that they should be secured by a deed of trust and by the vendor's lien. It was held that this was a subrogation and that these creditors were subrogated to all the rights, remedies, and liens of the estate, the original vendor, and therefore were safe from any claim of homestead.³

This rule does not extend, however, to *other* liens. Money loaned to pay for material furnished for improvements to the homestead does not create a lien thereon, nor does it subrogate the lender to the rights of one who has a mechanic's lien.⁴

A homestead can not be acquired as against a *mechanic's lien*. The law is now well settled that homestead rights can not attach to a house so as to defeat a *me-*

¹ *Hicks v. Morris*, 57 Tex. 658; (citing *Carr v. Caldwell*, 10 Cal. 380; *Swift v. Kraemer*, 13 Cal. 529; *Birrell v. Schie*, 9 Cal. 106;) *Joiner v. Perkins*, 59 Tex. 300.

² *Dillon v. Kauffman*, 58 Tex. 705.

³ *Wahrmund v. Merritt*, 60 Tex. 24.

⁴ *Gaylord v. Loughridge*, 50 Tex. 576.

chanic's lien.¹ This rule does not extend so far, however, as to allow such a lien to attach to a policy of insurance upon the homestead or the proceeds thereof.²

Under the provisions of the Act of 1871,³ the *husband alone*, as the head of the family, could in a proper case, in a *bona fide* transaction, where there was no intention to defraud the wife, so contract for material and labor to improve the homestead, *not* the separate property of the wife, as to make the claim therefor the basis to fix and secure the mechanic's lien.⁴ But since the Constitution of 1876 the homestead is not subject to forced sale for work and material used in constructing improvements thereon, unless the contract therefor is in writing and the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead.⁵

The provisions of the statute fixing a mechanic's lien upon a homestead should be complied with substantially in every respect.⁶

Creditors have no claim upon the homestead.—They trust every man with the understanding that he either has or may procure a homestead, upon which they have no more right to seize than they have upon the person of the debtor or the property of a third person in satisfaction of the debt.⁷ A sale, or voluntary conveyance,

¹ Potshuisky v. Krempan, 26 Tex. 309; Pope v. Graham, 44 Tex. 196; Campbell v. Fields, 35 Tex. 754.

² Cameron v. Fay, 55 Tex. 62.

³ Pasch. Dig. 7112, 7115.

⁴ Tinsley v. Boykin, 46 Tex. 599; Gaylord v. Loughridge, 50 Tex. 571; Miner v. Moore, 53 Tex. 228.

⁵ Barnes v. White, 53 Tex. 630; Huff v. Clark, 59 Tex. 347.

⁶ Tinsley v. Boykin, 46 Tex. 599.

⁷ Gaylord v. Loughridge, 50 Tex. 576.

therefore, of the homestead, can not be deemed a conveyance to defraud creditors, from whose claims there is a permanent, enduring exemption.¹

The mortgagee of a homestead stands in no better position than any other creditors.²

The fact that a party recites in a mortgage that certain property is not his homestead does not estop him from afterwards claiming the same as his homestead, even as against a purchaser at a sheriff's sale who claims to have relied on this mortgage statement made some years previous.³

A decree of divorce was rendered and an order made that certain property, claimed to be the homestead, be sold and the proceeds divided equally between the husband and wife. On the day of the sale under such order the property was sold on execution under a judgment against the husband. It was held that if the property was the homestead, it was not subject to forced sale, and a creditor could have no ground to complain that the court decreed the sale and the distribution of the proceeds between the parties entitled to it.⁴

The power of the husband to sell the homestead absolutely, or to convey it by gift, or to incumber it in any manner he sees fit, is limited only by the wife's consent, obtained in the mode pointed out by law. But he can not so bind it by *mortgage*, even with her consent, that it can be subjected to *forced sale*; nor could he so bind it if he were a single man, and the head of a

¹ *Gouenant v. Cockrell*, 20 Tex. 96; *Wood v. Chambers*, 20 Tex. 254; *Sossaman v. Powell*, 21 Tex. 665; *Cox v. Sharpstein*, 25 Tex. 123; *Martel v. Somers*, 26 Tex. 558.

² *Blair v. Thorp*, 33 Tex. 49.

³ *Robinson v. Davenport*, 40 Tex. 345.

⁴ *Richey v. Hare*, 41 Tex. 339.

family; not because the homestead can not be conveyed, or a mortgage or a trust can not be created upon it, but because a *forced sale* of it is forbidden by the Constitution of the State. There is no legal prohibition or restriction whatever except the prohibition of *forced sale*. If a mortgage or deed of trust needs to be enforced by a foreclosure it is futile, such being a *forced sale*. If, however, the mortgagee or trustee has the power to sell, such a mortgage or trust deed is effective, a sale by the mortgagee or trustee not being a *forced sale*.¹

A deed of trust can not be executed by the trustee *after the death of the constituent*, and whatever rights may be secured to a creditor by such deed can then be enforced only through and by aid of the court. If the property conveyed by the deed of trust is the homestead, it can not be sold by an order of the court, as such would be a forced sale. This rule obtains, even though the wife had joined the husband in a deed of trust. In such a case, after the death of the husband, if his estate is insolvent, the wife is relieved from a contract which was absolute and binding upon her while her husband lived, and takes an absolute title to the property.

The reason of this rule is, "not that the power is revoked by death, but that our statutes governing the settlement of estates postpone such claims to sundry others, *including the allowance* to be made to the widow and children in lieu of a homestead and other exempt property, and that a sale under the power would be inconsistent with these statutory preferences." Under

¹ *Sampson v. Williamson*, 6 Tex. 102; *Jordan v. Peak*, 38 Tex. 439; *Chipman v. McKinney*, 41 Tex. 76; *Whitehead v. Nickelson*, 48 Tex. 529; *Hunter v. Wooldert*, 55 Tex. 435.

this rule the homestead, or the allowance in lieu thereof, takes preference to claims secured by mortgage or lien, unless the security be given for the purchase money.¹ This rule is of course subject to the provisions of sections 2000 and 2007 Revised Statutes.²

Although a mortgage of the homestead contains a power of sale, and a stipulation that such power should not be revoked by the death of the constituent, yet the exercise of such a power after the death of the constituent, though it is a power coupled with an interest (and therefore irrevocable without any such stipulation), is inconsistent with the policy of the probate system and therefore not allowed.³

Homestead can not be acquired as against liens that attached before the homestead was established.—All liens acquired before the homestead has been established must be raised, or it will be subject to forced sale for their satisfaction. The homestead is not acquired against the vendor of the property until the title to the land has been perfected by the payment of the purchase money. Where a purchaser sold the entire tract on which he resided, to obtain money to meet the purchase money obligations, it was held that against the homestead rights of the widow, the sale passed the entire interest.⁴ Those liens which the Constitution

¹ Robertson v. Paul, 16 Tex. 472; McLane v. Paschal, 47 Tex. 370; Black v. Rockmore, 50 Tex. 95; Abney v. Pope, 52 Tex. 292; Mayman v. Reviere, 47 Tex. 357; McLane v. Paschal, 3 Texas Law Reporter, 258.

² Post.

³ Armstrong v. Moore, 59 Tex. 646.

⁴ Farmer v. Simpson, 6 Tex. 303; Shepherd v. White, 11 Tex. 353; Merchant v. Percy, 11 Tex. 22; White v. Shepperd, 16 Tex. 163; Clements v. Lacy, 51 Tex. 151; Campbell v. Elliott, 52 Tex. 160; Dillon v. Kauffman, 58 Tex. 707.

declares invalid are only such as are attempted to be given upon the property otherwise than they are permitted to be given by the Constitution, *after* the homestead character has been attached thereto. Consequently an appropriation of land as a homestead, subsequent to the levy of an attachment, or the attaching of a judgment lien, can not protect it from forced sale under the lien thus acquired.¹ A judgment rendered *after* the homestead character has attached, but enforcing a previously acquired attachment lien, creates a valid lien on the homestead.²

“If the homestead right attached to land” charged with preceding equities and incumbrances, “the husband, acting in good faith, has the right to adjust those equities and incumbrances, and in their adjustment to substitute for them a new lien.”³

The effect of a judgment enforcing an attachment lien is simply to enforce it on such interest of the judgment debtor in the property attached, that is subject, at the time of the attachment, to execution and forced sale. Such a judgment is not therefore conclusive of homestead rights in the property attached. It is not necessary that the question of homestead should be decided in such an action. “It may be that, if the attachment is levied on exempt property, the defendant in attachment could, by a plea in abatement, have the levy set aside. But unless the issue is made by the pleadings, the court does not pass upon the question of

¹ Potshuisky v. Krempekan, 26 Tex. 309; Batts v. Scott, 37 Tex. 65; Chipman v. McKinney, 41 Tex. 77; Mabry v. Harrison, 44 Tex. 294; Houston and G. N. R. R. Co. v. Winter, 44 Tex. 597; Baird v. Trice, 51 Tex. 559; Brooks v. Chatham, 57 Tex. 34; Gage v. Nablett, 57 Tex. 375.

² Baird v. Trice, 51 Tex. 559, overruling Stone v. Darnell, 20 Tex. 11.

³ Clements v. Lacy, 51 Tex. 160; Gillum v. Collier, 53 Tex. 599.

whether the property is or is not a homestead, and its judgment is neither 'directly on the point, nor does it necessarily involve the decision of the question.'"¹ But if it be sought to pass upon the question of homestead in such an action, the wife must be made a party.²

§ 72. Execution and appraisement. — *California*. — (a) *Before the Code*. — The value of the homestead was fixed in the Act of 1851 at five thousand dollars, and this limit has never been changed.

When execution was issued against the property of a party claiming said property as a homestead, upon the sworn affidavit of the judgment creditor that the cash value of such premises exceeded five thousand dollars, the court could appoint three appraisers to appraise the property. If they reported its cash value as exceeding this sum, the property was partitioned, if possible without destroying the homestead, and the excess sold; if such a partition could not be made, the whole was sold, and the excess over five thousand dollars applied on the execution. If the execution was against the husband whose wife was living, the five thousand dollars was deposited in court and governed by all the provisions of the homestead law as regards disposition and protection.³

A sale under execution of such property, ascertained by due appraisement to be worth over five thousand dollars, could not be made until an exact appraisement of the property had been ascertained. A sheriff's deed made before such an appraisement conveyed only an

¹ *Willis v. Mathews*, 46 Tex. 483.

² *Tadlock v. Eccles*, 20 Tex. 792.

³ *Hittell's General Laws*, 3543.

uncertain and undefined interest, upon which the purchaser could not maintain an action for possession.¹

This rule properly applied to a homestead consisting only of a single lot or tract of land on which was the dwelling of the debtor, but not necessarily to a homestead extending over two or more lots or tracts, on only one of which was the dwelling.²

(b) *Since the Code.*—The Code provides that in no other way except as therein provided can property which has been dedicated as a homestead, no matter what may be its actual value, be subject to execution or forced sale.³ This rule requires an appraisal in every case, and is therefore different from the rule above laid down.

Section 1245, Civil Code, provides that “when an execution for the enforcement of a judgment obtained in a case not within the class enumerated in section 1241⁴ is levied upon a homestead, the judgment creditor may apply to the Superior Court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof.”

Section 1246, Civil Code, provides that “the application must be made upon a verified petition, showing (1) the fact that an execution has been levied upon the homestead, (2) the name of the claimant, and (3) that the value of the homestead exceeds the amount of the homestead exemption.”

Sections 1247, 1256, Civil Code, provide that this petition must be filed with the clerk of the Superior Court;

¹ Gary v. Eastabrook, 6 Cal. 457.

² McDonald v. Badger, 23 Cal. 401.

³ Barrett v. Sims, 59 Cal. 618; Civil Code, § 1240.

⁴ Ante.

a copy thereof, with notice of the time and place of hearing, must be served on the claimant two days before the hearing; the judge must appoint three appraisers, who must within fifteen days make their report showing the appraised value of the premises and their determination upon the question as to whether the land can be divided without material injury to the homestead or not; the judge must order it to be divided or sold, according to the report,¹ and the homestead, or the proceeds of the sale to the amount of the homestead exemption, must be set off or paid to the homestead claimant. Section 1257, Civil Code, as first enacted, provided that the money paid to the claimant was entitled to the same protection against legal process and the voluntary disposition of the husband that the law gives to the homestead. In 1874 this was amended by limiting the period to *six months* during which it should be so protected.

In *Barrett v. Sims*, 59 Cal. 619, the court said: "There is but one method of ascertaining whether the property claimed as a homestead is of a value exceeding five thousand dollars, and whether there be any surplus for creditors, and that method is clearly pointed out in the sections above referred to. *Until such ascertainment, the property covered by the declaration is exempt from execution or forced sale.* There is no lien of the judgment until the levy of an execution; and that levy creates no lien except for the purpose of, and as a foundation for, instituting and carrying on proceedings to have an appraisal and sale under the statute. Therefore, a creditor, believing the property declared

¹ *Estate of Lord*, 2 West Coast Reporter, 130.

as a homestead to be of greater value than five thousand dollars, should have his execution levied upon the property, as a foundation, and then proceed as indicated in sections 1255, etc. *supra*."

There is no presumption that the value of property remains unchanged. The homestead is, therefore, to be determined as of the date of the appraisalment, and not of the dedication.

"At the inception it is limited to five thousand dollars in value, and when the property is enhanced in value so that it exceeds the statutory limit, the excess does not constitute a part of the statutory homestead. After the premises are worth five thousand dollars, every increase in value makes a reduction in the area of the homestead, until a point is reached where it can not be further cut down and leave a homestead of the value of five thousand dollars without material injury, and, after that point is reached, no part of the premises constitutes a statutory homestead, but the value or proceeds of the premises, to the extent of five thousand dollars, has the benefit of the exemption from forced sale."¹

Texas.—There is no statutory provision for subjecting the excess of an *urban* homestead to execution. The mode adopted has been to decree a sale of the homestead property, subject to an allowance out of the proceeds of the sale of the amount prescribed as the homestead valuation.²

If a *rural* homestead consists of more than two hundred acres, only that quantity is exempt.³ Prior to any

¹ McDonald v. Badger, 23 Cal. 401; Estate of Delany, 37 Cal. 180.

² North v. Shearn, 15 Tex. 174; Paschal v. Cushman, 26 Tex. 75.

³ Houston and G. N. R. Co. v. Winter, 44 Tex. 611.

statutory regulation, the head of the family had the right to designate what part of the larger tract or tracts he wished to retain as his homestead.¹ The question that presented the most difficulty in its solution prior to the Revised Statutes was: "To what part of the larger tract the homestead character attached?"

In *Houston and G. N. R. R. Co. v. Winter*² the court said: "The object of the statute was not to protect the house with two hundred acres of the most valuable land that might be on a large tract, but to protect the house and the farm, the yard, mill, gin, or whatever had been used in connection with the residence to make a support for the family." In this case the following rule in this regard was laid down: "The facts and circumstances surrounding the actual homestead constitute, in and of themselves, a designation of the locality of a homestead, with approximate though not definitely and exactly fixed boundaries, and not the variable intention, privately entertained or openly declared, of the head of the family. The question of intention does become important in some points of view, as for instance, in determining whether or not a person has acquired a homestead at all, as in case of domicile, or whether he has abandoned his homestead, or which one of two houses, where he sometimes resides in each, is his homestead, or which of the two fields that are in use in connection with his rural occupation or calling, is to be preferred when both can not be, and the like. But when a person is the occupant of a large tract of land, with a mansion house surrounded by or contiguous to his farm,

¹ *Mackey v. Wallace*, 26 Tex. 529.

² *Houston and G. N. R. Co. v. Winter*, 44 Tex. 611; *Willis v. Matthews*, 46 Tex. 484.

which he uses in his calling as a means of support, most of the tract being woodland or prairie, or consisting of a number of tracts, some of which are not used at all, such facts determine substantially and approximately the locality of his homestead, and the locality of portions of the large tract not so used to be not his homestead or part of it, irrespective of his intention at the time. If he should wish to change the locality of his homestead on such large tract by moving his residence to another portion of his tract, or by changing the boundaries of it substantially different from the locality which the pre-existing facts of ostensible use and enjoyment have fixed for him, he must do it before other persons have acquired a right by valid lien or purchase on such portion of the land as had not been a part of the homestead, and in such manner, by such use or actual designation, as not to permit others to be deceived or entrapped by the obvious appearances of his ostensible situation on his land."

The Revised Statutes provide the following mode of subjecting the excess of a large tract of land over and above the homestead :

1. "When the homestead of a family, not being in a town or city, is a part of a larger tract or tracts of land than is exempt from forced sale as such homestead, it shall be lawful for the head of the family to designate and set apart the homestead, not exceeding two hundred acres, to which the family is entitled under the Constitution and laws of this State."¹

2. "The party desiring so to designate and set apart the homestead shall file for record with the clerk of the

¹ Rev. Stats. § 2343.

County Court of the county in which the land or a part thereof may be, an instrument of writing, containing a description by metes or bounds, or other sufficient description to identify it, of the homestead so claimed by him, stating the name of the original grantee and the number of acres, and, if more than one survey, the number of acres in each.”¹ “Such instrument shall be signed by the party and acknowledged or proven as other instruments for record, and shall state that the party has designated and set apart as his homestead the tract or tracts of land so claimed by him; and such instrument shall be recorded by the clerk in the record of deeds of said county.”²

3. “Where the owner of such a homestead, part of a larger tract, as is described in article 2343, has failed to designate and set apart his homestead, as provided in the three preceding articles, the excess of such tract or tracts of land over and above the homestead exemption may be partitioned and separated from such homestead, and subjected to levy and sale under execution, if otherwise subject, as hereinafter directed.”³

4. “The sheriff or constable holding an execution against the owner of such excess of land over and above his exempted homestead, and not separated or partitioned therefrom, may, on his own motion, and shall, if required by the plaintiff in execution, his agent or attorney, notify the defendant in execution to designate and set apart his homestead from the remainder of the lands so owned and occupied by him, and that on the failure so to do within ten days, the sheriff or con-

¹ Rev. Stats. § 2344.

² Rev. Stats. § 2345.

³ Rev. Stats. § 2346.

stable will proceed to have such partition made as provided by law."¹

5. "The notice mentioned in the preceding article shall be written or printed, and shall be signed by the sheriff or constable."²

6. "Such notice may be served on the defendant by the sheriff or constable by reading the same to him, or by leaving a copy of the same at his place of residence with some person over fourteen years of age."³

7. "The notice and return indorsed thereon shall be filed by the proper officer of the court, and shall be *prima facie* evidence of the fact stated."⁴

8. "On the service of such notice the defendant in execution shall have the right, within ten days thereafter, to designate and set apart his homestead from any excess of land owned by him, and deliver the same to the sheriff or constable."⁵

9. "If the defendant in execution shall fail or refuse, within ten days after such notice, to so designate and set apart his homestead, the sheriff or constable holding such execution shall, at the earliest practicable time, summon either verbally or in writing, three disinterested freeholders of the county, neighbors of the defendant in execution, as commissioners to designate for the defendant his homestead."⁶

10. "The commissioners shall, as soon as practicable, proceed to partition the homestead from the remainder

¹ Rev. Stats. § 2347.

² Rev. Stats. § 2348.

³ Rev. Stats. § 2349.

⁴ Rev. Stats. § 2351.

⁵ Rev. Stats. § 2352.

⁶ Rev. Stats. § 2356.

of the tract or tracts, and may, if they deem it necessary, call in a surveyor to assist them. The action of such commissioners shall be reduced to writing and signed by them, or a majority of them, and shall be sworn to before some officer authorized to administer oaths, which shall be sufficient to admit the same of record."¹

11. "The designation of the homestead by such commissioners, shall contain all the requisites prescribed for a designation and setting apart by the defendant, and in addition thereto shall state that the commissioners making the same were summoned by the sheriff or constable holding said execution to perform such duty, and that the designation of homestead by them is fair and just to the best of their judgment and belief."²

12. "The commissioners shall return their said designation to the sheriff or constable." Whether this designation is made by the defendant or by commissioners, the sheriff must in either case file it with the clerk of the County Court to be recorded in the record of deeds of said county.³

13. When a homestead has been so as aforesaid designated, the sheriff or constable must make a return with such designation, showing: (1) That notice to designate his homestead was given to the defendant in execution, referring to said notice and return thereon, which shall be returned with said execution; (2) that the designation of his homestead was delivered to him by the defendant and has been filed by him with the county clerk, stating the date of such delivery and

¹ Rev. Stats. § 2357.

² Rev. Stats. § 2358.

³ Rev. Stats. §§ 2354, 2359.

filing; or, (3) that the proper proceedings were taken upon the failure of the defendant to so act. Such return shall be *prima facie* evidence of the facts therein stated.¹

14. Whenever the homestead of the defendant in execution has been designated as above mentioned, the officer holding said execution may proceed to sell the excess over and above the homestead, in accordance with the laws governing sales under execution.²

15. "The defendant may, at any time after his homestead has been designated and set apart in either of the modes pointed out in this chapter, change the boundaries of his said homestead by an instrument executed and recorded in the manner provided for in articles 2344 and 2345 (*supra*), but such change shall not impair the rights of parties acquired prior to such change."³

16. The following is a very important provision: "The provisions of this chapter in regard to the designation of the homestead are *cumulative*, and shall not be construed so as to interfere with or abrogate any other mode or remedy not known to the law, for subjecting the excess of the homestead tract of land over and above the exemption to forced sale, or any mode known to the law for procuring partition by the purchaser at execution sale, between himself and the owner of the homestead."⁴

The fact that the homestead was not designated before the levy of the attachment furnishes no ground for

¹ Rev. Stats. § 2360.

² Rev. Stats. § 2364.

³ Rev. Stats. 2365 (see *Houston and G. N. R. R. Co. v. Winter, supra*).

⁴ Rev. Stats. 2366 (see *Houston and G. N. R. R. Co. v. Winter, supra*).

setting the levy aside. It may be designated afterwards.¹

When parties claim a homestead in a tract of 520 acres in which they have only an undivided interest, their homestead right is not confined to their undivided interest in the two hundred acres including their improvements, but extends to an undivided interest of two hundred acres out of the entire tract.

This homestead right is equally protected, whether the part of the tract occupied and improved by them is allotted to them, or whether it is impracticable to allot to them this part, or when the entire tract is sold, in which last case it would attach to the proceeds.²

§ 73. Abandonment of the homestead.—*California*.—(a) *Before the Code*.—The statute at first provided no mode of abandonment, as also no mode of dedication.³ Under the theory as to joint tenancy, there could be no abandonment by the act of the husband alone. A removal of the husband and family from the premises did not, of itself, constitute an abandonment, nor was it evidence thereof.⁴ The only way in which the right of the wife to the homestead could be extinguished, was by a *joint* deed executed by both husband and wife, and properly acknowledged. *Separate* deeds by the husband and wife were not sufficient.⁵

The husband, under the theory that the homestead did *not* constitute a joint tenancy, could at any time, by *removal*, put an end to the homestead character and all

¹ *Jenkins v. Volz*, 54 Tex. 639; *Parker v. Coop*, 60 Tex. 111.

² *Jenkins v. Volz*, 54 Tex. 639.

³ *Ante*.

⁴ *Taylor v. Hargous*, 4 Cal. 268; *Holden v. Pinney*, 6 Cal. 234; *Moss v. Warner*, 10 Cal. 296; *Dunn v. Tozer*, 10 Cal. 167.

⁵ *Poole v. Gerrard*, 6 Cal. 71; *Dunn v. Tozer*, 10 Cal. 167.

the homestead rights. The statute conferred upon the wife no right to the homestead independent of the husband, which she could enforce against his consent. It afforded protection to him, and only through him to the wife and children. As by *his* act, the premises were originally impressed with the character of a homestead, so by *his act* they might be abandoned as such. The wife had to abide the consequences of such abandonment. So long as the premises retained the character of a homestead, and only so long, was her signature and acknowledgment necessary to a conveyance by the husband. If the premises were in fact abandoned, with no intention on the part of the *head* of the family to reoccupy them as a homestead, his conveyance alone was sufficient. If the removal from the premises was only temporary, they remained subject to *his* right to reclaim them as a homestead, and the wife had nothing to do with the assertion of this right. As occupancy of the premises by the husband and family was presumptive evidence of their appropriation as a homestead, so a removal from the premises by the husband and family was presumptive evidence of their abandonment. To rebut this last presumption, it had to be shown that the removal was only temporary.¹

The Act of 1860 provided a mode of abandonment as follows: "Nor shall said homestead property be deemed to be abandoned without a declaration thereof, in writing, be signed and acknowledged by both husband and wife or other head of a family, and recorded in the same office and same manner as the declaration

¹ *Guio v. Guio*, 14 Cal. 507; *Harper v. Forbes*, 15 Cal. 202; *Benson v. Aitken*, 17 Cal. 165; *Cohen v. Davis*, 20 Cal. 194; *Brennan v. Wallace*, 25 Cal. 111; *Johnston v. Bush*, 49 Cal. 198.

of claim to the same is required to be recorded; and the acknowledgment of the wife to such declaration of abandonment shall be taken separately and apart from her husband; *provided*, that if the wife be not a resident of this State, her signature and the acknowledgment thereof shall not be necessary to the validity of any mortgage or alienation of said homestead before it becomes the homestead of the debtor.”¹

(b) *Since the Code*.—Section 1243, Civil Code, provides that “a homestead can be abandoned only by a declaration of abandonment, or a grant, executed and acknowledged by the husband *and* wife, if the claimant is married, and by the claimant, if unmarried.”

Section 1244, Civil Code, provides that “a declaration of abandonment is effectual only from the time it is filed in the office in which the homestead is recorded.”

The execution by the husband and wife of a deed of conveyance of the homestead, absolute in form, but intended as a mortgage, is not an *abandonment* of the homestead, except as against an innocent purchaser.²

A removal of the husband and wife from the State, and his becoming the citizen of another State and voting there, do not constitute an abandonment of a homestead. Under the law there is none other than the statutory mode of abandonment. When it is once regularly created out of a parcel of land, in accordance with the statute, “the estate so created continues to exist until put an end to in the mode pointed out by the statute.”³

¹ Stats. 1860, 311; Stats. 1862, 519. *Nevada*—Compiled Laws, 187 (same as Stats. 1860, 311).

² *Mabury v. Ruiz*, 58 Cal. 11.

³ *Porter v. Chapman*, 3 West Coast Reporter, 204.

Sale of a portion of the homestead.—A sale by the husband and wife of an undivided portion of the homestead destroys the homestead equally as well as a sale of the entire property.¹ Where the husband and wife conveyed an undivided one-half of the homestead premises to A, who, at the same time, and as a part of the same transaction, conveyed the said property back to the husband, the court held that there was a period of time, however short, during which the title to the undivided one-half was vested in A, and the homestead right was destroyed.²

Acknowledgment by the wife of a declaration of claim and of abandonment.—(a) *Before the Code.*—The Act of 1860³ required the declaration of *claim* to be signed by the party making the same, and acknowledged and recorded as conveyances affecting real estate were required to be acknowledged and recorded; but the acknowledgment of the wife to the declaration of *abandonment* it required to be taken separately and apart from her husband. The Act of 1862⁴ required the acknowledgment of the wife to the declaration of *abandonment* to be taken in the manner required by law in the case of the conveyance by her of *her separate real property*. In *Clements v. Stanton*⁵ it was accordingly held that a married woman could acknowledge a declaration of claim as required by law in conveyances of real estate by persons other than a married woman. The court based its decision upon the different wording of the statute in regard to the two kinds of declaration.

¹ *Kellersberger v. Kopp*, 6 Cal. 563.

² *Carroll v. Ellis*, 63 Cal. 440.

³ *Ante*.

⁴ *Ante*.

⁵ *Clements v. Stanton*, 47 Cal. 61.

(b) *Since the Code*.—Section 1262, Civil Code, provides that the declaration of claim must be executed and acknowledged in the same manner as a grant of real property is required to be acknowledged. Section 1243, Civil Code, provides simply that the declaration of abandonment shall be executed and acknowledged. If the reasoning of *Clements v. Stanton* were applied to these sections, the rule adopted in that case would be reversed.

We would suggest, however, that, whenever the acknowledgment of a married woman is mentioned in the Code, reference is had to the only acknowledgment provided for her in the Code, and, therefore, that in both declarations, her acknowledgment should be the same.

Texas.—A joint conveyance of the homestead by husband and wife is an abandonment.¹

If they jointly sell an undivided part of their homestead, this is a *pro tanto* abandonment, and the purchaser is entitled to partition.²

The fact of removal, coupled with an intention never to return to the homestead, constitutes an abandonment, and nothing less does. The length of time during which parties remain away from a place formerly used as a homestead can be looked to only for the purpose of ascertaining the intent with which the removal is made. It is not necessary that the absence be continued for a long time to constitute abandonment, and an absence for however so long a time will not of itself have such a result, and yet such absence may be so long continued,

¹ *Houghton v. Marshall*, 31 Tex. 198; *Edmonson v. Blessing*, 42 Tex. 600.

² *Ferguson v. Reed*, 45 Tex. 583.

and under such circumstances, that a jury would be authorized to find that the intention never to return and again use the homestead existed, although another homestead had not been acquired. Abandonment ought, however, never to be found unless the removal and accompanying facts clearly show that the party in removing never intended to return to the homestead and use it as a home. How this intent is to be established must depend to a great extent upon the circumstances and facts surrounding each case. The declarations of a party before, at the time of, and after leaving his home, may be given in evidence to establish this intent.¹

“When the family have distinctly and unequivocally removed from one house, or ‘mansion house,’ and its adjoining land, and taken up their permanent abode and place of residence in another house, upon a different place, and where there is nothing connected with such removal and residence indicating that it is not intended to be permanent, certainly the presumption arises, if indeed the absolute conclusion is not warranted, in support of the title of one who has purchased it in good faith from the husband, that the place from which the family have gone is *abandoned* as their *homestead*. If the object or purpose of the removal is uncertain or equivocal in its character, no doubt the contemporaneous declarations of either the husband or wife, if not inconsistent with, but tending to explain the real import and purpose of such removal, would be entitled to much weight, and especially if openly and publicly made, and

¹ *Cline v. Upton*, 56 Tex. 322 S. C., 59 Tex. 29; *Franklin v. Coffee*, 18 Tex. 416; *Gouhenant v. Cockrell*, 20 Tex. 96; *McMillan v. Warner*, 38 Tex. 414; *Austin v. Townes*, 10 Tex. 24.

where their subsequent conduct is in accord with such declarations.”¹

The question of abandonment is almost exclusively a question of intent, since *no legal abandonment can occur without a fixed intent* to renounce and forsake, or to leave the homestead and never return to it as a homestead. Property, of course, may be abandoned as a homestead and still be held and occupied for other purposes. But the intent to abandon must be clearly established by proof. Where a home, residence, or settlement has been once acquired on lands, it would not be necessary that there should be continuous, actual occupation to secure the land from forced sale.²

“The homestead is not to be regarded as a species of prison bounds, which the owner can not pass over without pains and penalties. His necessities or circumstances may frequently require him to leave his homestead for a greater or less period of time. He may leave on visits of business or pleasure; for the education of his children; or to acquire, in some more favorable location, means to improve his homestead; or for the subsistence of his family; or he may intend to abandon, provided he can sell. But let him leave for what purpose he may, or be his intentions what they may, provided they are not those of total relinquishment or abandonment, his right to the exemption can not be regarded as forfeited. And if he intend, on leaving, to abandon, this may be changed by him up to the time that he acquires a new homestead. He may show this change by the resumption of his residence; or it may

¹ *Woolfolk v. Ricketts*, 48 Tex. 37; *Slavin v. Wheeler*, 61 Tex. 654.

² *Edmonson v. Blessing*, 42 Tex. 601; S. C. 49 Tex. 337.

be made known in other modes, and however it may be made known or ascertained, it will be effectual to protect his rights; for, if the place be in fact his homestead, it can not be exposed to forced sale. Frauds will not be permitted; but the right to the homestead can not be forfeited unless by a party showing a continuous abandonment up to the time that some opposing right by sale has vested legally in other parties.”¹

A temporary absence for six or eight months, leaving some one in charge, does not amount to an abandonment, where no new residence is acquired.² Nor will the mere fact of one's absence from his home, in the discharge of his public duty as a soldier, operate as such an abandonment, even though he is not a married man.³

A married woman was the owner of a lot of land of about four acres, which was the homestead of the family. She sold a portion of it, including the residence and improvements, intending and reserving the remaining portion of the lot as a homestead, but not occupying it as such nor improving it for such a purpose. The above intention continued and existed at the date of a levy upon this lot under a judgment made about one year and eight months thereafter. No other homestead had been acquired in the meantime. It was held that the existence of this intention to reoccupy it as a homestead negatived the idea of any intention to abandon it.⁴

The simple fact of the absence of a widow from the homestead for two years after her husband's death is not

¹ *Shepherd v. Cassidy*, 20 Tex. 29.

² *Taylor v. Boulware*, 17 Tex. 77.

³ *Henderson v. Ford*, 46 Tex. 630.

⁴ *Scott v. Dyer*, 60 Tex. 135.

of itself proof of abandonment,¹ nor does the mere removal of a family from their homestead for the purpose of educating their children amount to an abandonment.²

A man and his family occupied a house and eight lots in a town. After the death of his wife the said property was rented, and the children continued to board with the lessee. The husband also boarded there, but slept in a house on a lot owned by him, but several blocks distant. This latter house was divided into two rooms, one of which was used as a law office. It appearing that the renting of the house and eight lots was only temporary, and that there was no intention of abandonment, the entire property was held to be a homestead.³

The domicile of the husband draws to it the legal domicile of the family. The mere absence of the wife from the State, when not designed as an abandonment of her husband, but with his consent, and with the intention to make his domicile her future home, will not work a forfeiture of her homestead rights,⁴ as, where the husband, who had come to Texas alone, and, after having arrived there and determined to make it his home, died before the family came; or where the absence of the wife was, with the consent and approbation of the husband, for the purpose of superintending the education of her daughter.⁵

The husband, without being joined by his wife, sold the homestead, and then moved with his wife and fam-

¹ *Carter v. Randolph*, 47 Tex. 381.

² *Thomas v. Williams*, 50 Tex. 275.

³ *Pryor v. Stone*, 19 Tex. 372.

⁴ *Russell v. Randolph*, 11 Tex. 460; *Lacey v. Clements*, 36 Tex. 661; *Clements v. Lacy*, 51 Tex. 157.

⁵ *Woolfolk v. Ricketts*, 48 Tex. 37; *Slavin v. Wheeler*, 61 Tex. 654.

ily out of the State and died. It was held that by removing and changing her domicile to another State, the wife relinquished her right of homestead. When the wife voluntarily leaves the homestead with intention never again to return to it, and seeks with her husband a home in another State, she relinquishes any right of homestead which she might have retained had she continued an inhabitant of the State. Her removal from the State is inconsistent with any right remaining to her former homestead, and effectually precludes her from afterwards asserting such right.¹

“If the husband, in fraud of the rights of the wife and without her consent, should seek by an abandonment to withdraw the homestead from the pale of its exemption given for the benefit of the family, he could have no power to do so; but while he acts in good faith and not against the will of the wife, having alone in view the good of the family, of which by nature and by law he is the recognized head, his power to abandon a homestead ought not to be questioned; and in the absence of evidence to the contrary, it ought to be presumed, when a removal from a homestead is made, that it was made in good faith and with the consent of the wife. Especially should this be so when third parties have acquired rights in the property under circumstances which indicated to them that the homestead exemption did not longer cover the property.”²

The mere tacit knowledge on the part of the wife, of the wrongful occupation and improvement of a portion

¹ *Jordan v. Godman*, 19 Tex. 275; *Smith v. Uzzell*, 56 Tex. 317 (see *Mills v. Von Boskirk*, 32 Tex. 360).

² *Smith v. Uzzell*, 56 Tex. 318; *Slavin v. Wheeler*, 61 Tex. 654.

of the homestead, can not amount to an abandonment by her, nor can the family be deprived of the homestead until compensation is rendered for improvements which, without interfering to stop them, the wife knew were being erected thereon by a trespasser.¹

A homestead may be abandoned *without the acquisition of another*,² and yet the "most satisfactory evidence of the abandonment of a place once a homestead is the acquisition of another."³ If a man and his family should leave one home in search of another, the former is not necessarily abandoned until another has been acquired. Where a husband removed his family into another county from that in which was their home, and then abandoned them without providing them a new home, it was held that the wife might resume possession of the old home.⁴

This question of abandonment is so well discussed in *Foreman v. Meroney*,⁵ that the decision is given almost in full. The facts of the case were that the widow had married again, and was living with her husband and children in a different county. She had no definite purpose to return to the homestead at any particular time, and probably at no time. The court said : "Does this amount to an abandonment, so as to forfeit the homestead rights of the mother and children? If so, the court below erred, and the judgment must be re-

¹ *Eckhardt v. Schlecht*, 29 Tex. 133.

² *Slavin v. Wheeler*, 61 Tex. 659.

³ *Trawick v. Harris*, 8 Tex. 312; *Shepherd v. Cassiday*, 20 Tex. 24; *Goube-nant v. Cockrell*, 20 Tex. 98; *Cox v. Shropshire*, 25 Tex. 113; *McMillan v. Warner*, 38 Tex. 413; *Woolfolk v. Rickets*, 41 Tex. 362; *Thomas v. Williams*, 50 Tex. 275.

⁴ *Franklin v. Coffee*, 18 Tex. 416.

⁵ *Foreman v. Meroney*, 3 Tex. Law Reporter, 233.

versed. The language of the Constitution is as follows (Art. 16, § 52): 'On the death of the husband or wife the homestead shall not be partitioned among the heirs of the deceased during the lifetime of the survivor, or so long as the survivor may choose to use or occupy the same as a homestead.'

"What is the meaning of the words 'use and occupy the same as a homestead'? Are we to understand that the survivor must actually remain upon the land? Clearly not; for the preceding section of the Constitution (Art. 16, § 51) provides that 'any temporary *renting* of the homestead shall not change the character of the same, when no other homestead has been acquired.' Thus the surviving wife might rent the homestead from year to year for many years, and this would be only a temporary renting; because the renting might possibly cease and the occupancy by the family be resumed at the end of any year, as the convenience or comfort of the family might suggest. The Probate Court can not select or provide a homestead adapted to the wants of the surviving family. It can only set apart to them the homestead of the deceased, whether it be a suitable one for them or not. It may happen, as is the case here, that the homestead is the only property of the family, and can be made available to them only by being rented. The mother and little children can not cultivate the soil, nor can they control and manage the labor necessary for that purpose, and it may happen that in order to rent it to the best advantage, the *dwelling* must be temporarily given up to tenants. Thus the family might—sometimes from necessity, sometimes from convenience—be locally absent from the home-

stead for years, without in any degree affecting their rights. The law is not concerned about the precise locality of the family at any time; but it is concerned that wherever they may be carried by convenience, or chance, or misfortune, there shall be a place to which they may return to find the shelter and security of a home. *An abandonment is accomplished, not by going away without an intention of returning at any particular time in the future; but by going away with the definite intention never to return at all.*"

The same strict rule in regard to abandonment is not required where a surviving husband qualifies as such for the purpose of the control and disposition of the property, and then, by an affirmative express act of his own, incumbers it, and perhaps thus induces credit to be given him which would not otherwise have been extended, as in cases where an existing creditor seeks, as against the wife, to subject the homestead to execution, or where the husband temporarily leaves the homestead in the legitimate pursuit of his occupation.¹

A lien given upon property which is, in fact, a homestead, is invalid, although there may be an intention, even evidenced by writing, to make the homestead not embrace the property upon which the lien is given. The mere designation of something less than the homestead as the homestead can not withdraw from it that character, any more than can the mere intention to abandon a homestead, unaccompanied with removal therefrom, operate as an abandonment. There is no doubt that persons may abandon a part of that which is a homestead, in good faith, and appropriate it to uses

¹ *Jordan v. Imthurn*, 51 Tex. 288.

which will deprive it of its homestead character, while the other part may continue to be homestead. If such transaction, however, is only colorable, or done by the husband in fraud of the rights of the wife, or in any manner with intent, the property really remaining a homestead, to evade the provision of the Constitution which prohibits the giving of liens upon the homestead, then the property would continue a homestead, and a lien attempted to be given upon it would be void.¹

Statute of Limitations.—There is nothing to exempt the homestead from the operation of the Statute of Limitations.²

§ 74. Exchange of homestead.—*California.*—Where A, with the intention of securing a homestead in the country instead of in town, exchanged certain land in a town, which he had occupied as a homestead, for land in the country, the two deeds of exchange and a declaration of homestead upon the newly acquired land being at the same time, in regular succession, executed, acknowledged, and filed for record, the exchange and the declaration of homestead constituted a single transaction, and the homestead right attached the moment the title vested in A.³

If the wife declared a homestead on common property, and the husband procured a policy of insurance on the house thereon, and the house was destroyed by fire, the homestead character attached to the sum due from the insurance company.⁴

¹ *Medenka v. Downing*, 59 Tex. 40; *ante*.

² *Smith v. Uzzell*, 61 Tex. 220; S. C. 56 Tex. 315.

³ *Eby v. Foster*, 61 Cal. 282.

⁴ *Houghton v. Lee*, 50 Cal. 101.

Texas.—Exchanges made of exempt property for other property are of two kinds, *voluntary* and *involuntary*.

If a debtor *voluntarily* exchanges property *specifically exempt* from execution for property *not so exempt*, he can not claim exemption for the property received in exchange. If a horse, a cow, an ox, furniture, farming utensils, tools of trade, or any other personal property exempt by law from execution be exchanged for money, merchandise, or the like, the property thus acquired, not being of the classes so as aforesaid exempt, would be subject to execution for the new owner's debts. On the other hand, if horses, cows, furniture, etc., should be received in exchange, not beyond the limit allowed by law, they would not be subject to execution. The same rule applies to a homestead.

In cases of an *involuntary* exchange of property, the newly acquired article becomes exempt, whether it was of a class originally protected from execution or not; as in a case where the exempt property is destroyed by fire, the insurance money received from it is exempt, whereas money received upon a voluntary sale would not be exempt. In such cases it makes no difference whether the article destroyed be a piece of personalty or a dwelling house upon the homestead.¹

When exempt property has been taken from the owner against his will, and its form changed by process of law (as in case of a homestead exceeding in value the amount allowed), the proceeds are protected until there

¹ *Schneider v. Bray*, 59 Tex. 670 (explaining *Whittenberg v. Lloyd*, 49 Tex. 633, and *Wolfe v. Buckley*, 52 Tex. 641).

is reasonable opportunity to reinvest them in other exempt property.¹

In *Hunter v. Wooldert*² it was held that the sale of a homestead under a mortgage containing a power of sale was, as to the "overplus" of the proceeds of the sale, after paying the secured debt, a forced sale, an involuntary change of the form of the homestead, and was therefore not subject to seizure by creditors, or appropriation by the trustee for others, until a reasonable opportunity had been afforded the homestead claimants to reinvest them in another homestead.

The proceeds of a policy of insurance upon the homestead are, for a reasonable time, exempt for reimbursement in a new homestead which may or may not be upon the same lot.

The change in the form of homestead property by inevitable accident or act of God is considered an "involuntary" change, and hence comes under the above rule.³

A debtor has a right to sell his homestead and acquire another with the proceeds, or otherwise, without thereby subjecting the abandoned homestead to his general debts, and his vendee will take a good title as against a judgment creditor who otherwise would have a lien.⁴

In *Watkins v. Davis* (*supra*) the court said: "It seems that at the time her (the plaintiff's) husband died, and for some time prior thereto, they were occu-

¹ *North v. Shearn*, 15 Tex. 175; *Wood v. Wheeler*, 11 Tex. 122; *Hunter v. Wooldert*, 55 Tex. 436.

² *Hunter v. Wooldert*, 55 Tex. 436.

³ *Cameron v. Fay*, 55 Tex. 62.

⁴ *Black v. Epperson*, 40 Tex. 162; *Watkins v. Davis*, 61 Tex. 415.

pying a lot in the city of Dallas as their homestead; they had no children, and the family consisted of two; after the husband's death, she being old, infirm, and barely able to make a support for herself, continued to occupy the place until it was about to be sold for the accumulated taxes thereon, and which she was not able to pay. *For the purpose of saving the property from tax sale, and with the intention of purchasing the land in controversy with the proceeds for a homestead*, she sold and conveyed the city homestead, and, *with the proceeds arising therefrom, she purchased that in controversy*, and moved upon and was occupying the same as a homestead at the time of the levy and sale at which appellee purchased. . . . In legal effect such a transaction does not materially differ from an exchange of one homestead for another. There, the one is converted into money before the other is acquired, but when that is done with the specific intention and for the purpose of acquiring another, the object being to secure one homestead by disposing of another, no good reason is perceived why that might not be accomplished without subjecting either the proceeds or the home in which it is invested to forced sale." In this case the court laid down this general rule: "*When the sale of the homestead is made with the bona fide intention of investing the proceeds in another, and that is done, the latter will be protected from forced sale.*"

§ 75. Tenure of a married woman in the homestead.—*California*.—(a) *Before the Code*.—Before the passage of the amendment of 1860¹ the homestead was treated as a joint tenancy. In *Taylor v. Hargous* the court said:

¹ *Ante*.

"As soon as a place, by the occupancy in good faith, of the family, acquires the nature of a homestead, the nature of the estate becomes changed, without reference to the manner in which the title to the property originated, whether it was the separate estate of either husband or wife, or the common property of both. It is turned into a sort of joint tenancy, with the right of survivorship, at least as between husband and wife."¹

This doctrine was subsequently overruled. The court held that there was no joint tenancy; that the dedication of the land as a homestead, under the Act of 1851, did not change the nature of the prior estate therein; that the premises remained separate or common property, as they were before such dedication; and that the estate rested where it existed before the appropriation.²

Where the homestead had been carved out of common property, and the wife died, leaving children, it was held that the children immediately inherited the interest of the mother therein.³ The court said: "It is clear, therefore, that if the homestead claim was terminated by the death of the wife, her interest in the property immediately vested in her children, who became tenants in common with their father, and were entitled to be let into possession with him. On the other hand, if the homestead claim survived to the husband as the head of the family, nevertheless the children were not thereby deprived of their interest in the

¹ *Taylor v. Hargous*, 4 Cal. 273; *Poole v. Gerrard*, 6 Cal. 73; *Revalk v. Kraemer*, 8 Cal. 73; *Estate of Tompkins*, 12 Cal. 114; *Gimmey v. Doane*, 22 Cal. 639.

² *Gee v. Moore*, 14 Cal. 477; *Guio v. Guio*, 14 Cal. 508; *Bowman v. Norton*, 16 Cal. 213; *Himmelman v. Schmidt*, 23 Cal. 120; *Brannan v. Wallace*, 25 Cal. 114; *McQuade v. Whaley*, 31 Cal. 531; *Johnston v. Bush*, 49 Cal. 201.

³ *Ante*; *Johnston v. Bush*, 49 Cal. 201.

common property, which they had inherited from their mother, and which they held, subject only to the homestead claim of their father."

The Act of 1860 declared that the homestead was held by the husband and wife as joint tenants.¹ This provision, however, had to be read in connection with the following, "The homestead and other property exempt from forced sale shall, upon the death of either husband or wife, be set apart by the Probate Court for the benefit of the surviving husband or wife and his or her legitimate children; and in the event of there being no survivor or legitimate children of either husband or wife, then the property shall be subject to the payment of their debts."²

Although the husband and wife were denominated joint tenants, yet they were not so in the full sense of the term, and the children took some interest by inheritance from their deceased father or mother.³

The Act of 1862 provided as follows: "The homestead property selected by the husband and wife, or either of them, according to the provisions of said Act, shall, upon the death of the husband or wife, vest absolutely in the survivor, and be held by the survivor as fully and amply as the same was held by them, or either of them, immediately preceding the death of the deceased, and shall not be subject to the payment of any debt or liability contracted by or existing against the said husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except

¹ *Ante*.

² *Stats.* 1860, p. 311; *Nevada—Compiled Laws*, 189; *Stats.* 1883, p. 16.

³ *Rich v. Tubbs*, 41 Cal. 36.

such debt or liability as the homestead was subject to at the time of the death of such husband or wife."¹

After the passage of this Act the children did not inherit any interest in the homestead;—it vested absolutely in the survivor. The homestead character terminated with the death of either spouse, the survivor took it absolutely, and it became liable, like all his or her other property, for debts contracted after such death.²

(b) *Since the Code*.—Section 1265, Civil Code, as first enacted, provided as follows: "If the declaration (of homestead) was made by a married person, the land is thereafter by the spouses held in joint tenancy, and on the death of either of the spouses, and subject to no other liability than such as exists or has been created under the provisions of this title, it descends to and the title at once vests in the survivor."³

In 1874 this was amended so as to read as follows: "If the selection was made by a married person from the *community property*, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title;⁴ *in other cases*, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the Superior Court to assign the same for a limited period to the family of the decedent; but

¹ Stats. 1862, p. 519.

² *Estate of Wixom*, 35 Cal. 320; *Estate of Delaney*, 37 Cal. 176; *Rich v. Tubbs*, 41 Cal. 37; *Higgins v. Higgins*, 46 Cal. 266; *Gagliardo v. Dumont*, 54 Cal. 501; *Herrold v. Reen*, 58 Cal. 448; *Watson v. His Creditors*, 58 Cal. 556.

³ *Estate of Headen*, 52 Cal. 294.

⁴ *Ante*.

in no case shall it be held liable for the debts of the owner except as provided in this title.”¹

Almost on the same day, but subsequently, with the enactment of the above provision of the Civil Code, a similar provision was made in the Code of Civil Procedure. (§ 1474, Code of Civil Procedure.)

Section 1474, Code of Civil Procedure, as first enacted, provided as follows: “The homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both are living, on the death of the husband or wife vests absolutely in the survivor, and is not, nor are the proceeds of a sale thereof, subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such mortgage or lien as the homestead was subject to at the time of the death of such husband or wife.”

This was amended in 1874 and in 1880 so as to read (the parts in brackets are the amendments of 1880) as follows: “If the homestead selected by the husband and wife, or either of them, during the coverture, and recorded while both were living, was selected from the community property [or from the separate property of the person selecting or joining in the selection of the same], it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or

¹ *Ante*; *Mawson v. Mawson*, 50 Cal. 539.

The homestead, under this amendment, was still regarded as a joint tenancy, of which the husband and wife were jointly seized in equal shares, when it was selected from the community property. (*Schuler v. Savings and Loan Society*, 1 West Coast Reporter, 125.)

wife [without his or her consent], it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the Superior Court to assign it for a limited period to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code.¹

This amendment makes an important change in the law as contained in section 1265, Civil Code.² Under the latter the homestead vests in the surviving husband or wife only when it has been carved out of *community* property. Under this amendment it vests in the survivor in all cases except when it has been carved out of the separate property of the deceased husband or wife without his or her consent. As it can not be carved out of the separate property of the wife without her consent, it follows that the homestead vests absolutely in the surviving husband or wife as prescribed in said sections, except when it has been selected by the wife out of the separate property of the husband, without his consent.³

The widow's rights are determined by the law in force at the time of the creation of the homestead.⁴ In *Rich v. Tubbs*, it was held that her rights were governed by the law in force at the time of the death of the husband. In *Estate of Headen*, it was held *per*

¹ Code of Civil Procedure, § 1474.

² *Ante*.

³ *Nevada*.—No exemption to the surviving spouse shall be allowed when the homestead declaration has been filed upon the separate property of either husband or wife. (Stats. 1879, p. 141.)

⁴ *Rich v. Tubbs*, 41 Cal. 34; *Estate of Headen*, 52 Cal. 297.

contra, and as above stated. The court held that the fourth section of the Act of 1860, which was involved in *Rich v. Tubbs*, was clearly a statute of descent and distribution as applicable to property which had been appropriated as a homestead, but that section 1265, Civil Code, is not a statute of succession, but that it defines interest that the spouses severally acquire and hold by virtue of the declaration of homestead. When, therefore, a homestead was carved out of the separate property of the husband in 1873, and the husband died in 1875, after the amendment of 1874 to section 1265,¹ the wife took title as surviving joint tenant, and not by descent. Under the rule of *Rich v. Tubbs*, the homestead would have gone to the heirs or devisees of the husband.

Setting apart the homestead to the surviving wife.—The Probate Act of 1851, section 121 (as amended in 1861), provided as follows: "Upon the return of the inventory, or at any subsequent time, during the administration, the court, or probate judge, may of his own motion, or on application, set apart for the use of the family of the deceased, all personal property which is by law exempt from execution, and the homestead as designated by the general homestead law."²

This was re-enacted in the Code, the words "family of the deceased" being omitted, and "surviving husband or wife, or the minor children of the decedent" substituted in their place.³

¹ *Ante*.

² Hittell's General Laws, 5819; Nevada—Compiled Laws, 603; the phrase "may set apart" means "must set apart;" Estate of Walley, 11 Nev. 262.

³ Code of Civil Procedure, 1465.

In 1880 this was amended so as to read as follows (the parts in brackets are the amendments of 1880): "Upon the return of the inventory, or at any subsequent time during the administration, the court may on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or [in case of his or her death], to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded; *provided*, [*such homestead* was selected from the common property, or from the separate property of the persons selecting or joining in the selection of the same.]"

Section 1475, Code of Civil Procedure, as first enacted, provided as follows: "If the homestead selected and recorded prior to the death of the decedent is returned in the inventory, appraised at not exceeding five thousand dollars in value, the Probate Court must, by order, set it off to the persons in whom title is vested by the preceding section.¹ If there are subsisting liens or incumbrances on the homestead, they must be paid out of the funds of the estate, if there remain sufficient for that purpose, after the payment of all claims against the estate."

In 1874 this was amended as follows: "If the homestead selected prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the Probate Court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens

¹ *Ante*.

or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims allowed against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionally with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

The homestead does not constitute any part of the assets of the estate of a deceased husband or wife.—The Probate Court in setting apart for the use of the family of the deceased husband or wife property which had been designated as a homestead does not change or transfer the title nor adjudicate the question of title between rival claimants. The purpose and effect of the order setting apart such homestead is merely to relieve the property from administration and set it apart for whom it may concern.¹ Nor does it affect any liens that are on the premises.² It can not set apart a homestead "subject to liens and payment of existing mortgages."³ Nor can it make an order for the sale of the homestead to pay debts of the deceased, even though they are se-

¹ *Rix v. McHenry*, 7 Cal. 89; *Gee v. Moore*, 14 Cal. 478; *Estate of Tompkins*, 12 Cal. 125; *Lies v. De Diablar*, 12 Cal. 327; *Estate of James*, 23 Cal. 418; *Estate of Orr*, 29 Cal. 104; *Estate of Wixom*, 35 Cal. 324; *Rich v. Tubbs*, 41 Cal. 36; *Schadt v. Heppe*, 45 Cal. 437; *Estate of McCauley*, 50 Cal. 544; *Herrold v. Reen*, 58 Cal. 443; *Watson v. His Creditors*, 58 Cal. 556; *Estate of Burns*, 54 Cal. 223; *Estate of Rondel*, *Myrick's Probate Reports*, 70; *Estate of Low*, *Myrick's Probate Reports*, 150; *Estate of Hardwick*, 59 Cal. 292; *Estate of Burton*, 1 *West Coast Reporter*, 254.

² *Estate of Orr*, 29 Cal. 104; *Estate of McCauley*, 50 Cal. 544.

³ *Estate of Chalmers*, 12 *Pacific Coast Law Journal*, 12.

cured by a valid lien on the premises.¹ The statute confers no such authority.

A mortgagee of the homestead must seek his remedy in some other tribunal than the Probate Court. The remedy must be found in proceedings for a foreclosure, not in the probate proceedings for settling an estate.² This is due to the fact that, when it has been set apart for the use of the family of the deceased, it ceases to be a part of the assets of the estate, and neither the court nor the administration has further power over it, and it becomes for all future purposes of the administration as if it had never existed.³

The Code has, however, made one change. Formerly the mortgagee was not compelled to present his claim against the estate before proceeding to foreclose. Now he must so present it.⁴

Misconduct of wife.—A wife is not deprived of her right to have the homestead set apart to her by reason of adultery, or of her abandonment or desertion of the homestead or the family.⁵

Texas.—The Constitution provides as follows: "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long

¹ Estate of Orr, 29 Cal. 103.

² Estate of Chalmers, 12 Pacific Coast Law Journal, 12; Estate of Hardwick, 59 Cal. 292.

³ *Ante*; Estate of Orr, 29 Cal. 104; Estate of James, 23 Cal. 418; Estate of Hardwick, 59 Cal. 292.

⁴ Shadt v. Heppe, 45 Cal. 433; Camp v. Grider, 62 Cal. 20.

⁵ Lies v. De Diablar, 12 Cal. 327.

as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.”¹

The Revised Statutes provide as follows: “The homestead shall not be partitioned among the heirs of the deceased during the lifetime of the widow, or so long as she may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.”²

“When a widow dies or sells her interest in the homestead, or elects to no longer use or occupy the same as a homestead, and when the proper court no longer permits the guardian of the minor children to use and occupy the same as a homestead, it may be partitioned among the respective owners thereof in like manner as other property held in common.”³

“The homestead rights of the widow and children of the deceased are the same whether the homestead be the separate property of the deceased or community property between the widow and the deceased, and the respective interests of such widow and children shall be the same in one case as in the other.”⁴

Setting apart the homestead to the surviving wife.—Texas.—The Revised Statutes provide as follows :

1. “At the first term of the court after an inventory, ap-

¹ Const. 1876, Art. XVI, § 52.

² Rev. Stats. 2004.

³ Rev. Stats. § 2005.

⁴ Rev. Stats. § 2006.

praisement, and list of claims have been returned, it shall be the duty of the court by an order entered upon the minutes, to set apart for the use of the *widow and minor children and unmarried daughters remaining with the family of the deceased*, all such property of the estate as may be exempt from execution or forced sale by the Constitution and laws of the State, with the exception of any exemption of one year's supply of provisions."¹ The Statutes of 1843, 1846, and 1848, made no distinction, in terms, between *minor and adult* children.² The Statute of 1848 was construed, however, as applying only to *minor* children.³

2. "In all cases the *homestead* shall be delivered to the widow, if there be one, and, if there be no widow, to the guardian of the minor children and unmarried daughters, if any, living with the family."⁴ It has been held, however, that the homestead vests in the widow and minor children, with or without administration, and whether it be or be not set apart by the court.⁵ When an application is made to the court to set aside the homestead for the use of the widow and children, it is incumbent upon the applicant to show, *prima facie* at least, that it is the duty of the court to make the decree asked for. It should be made to appear to the satisfaction of the court, from the inventory or otherwise, not only that the party for whom the order is asked is entitled to it, but also that the particular property asked to be set aside is the character of property to which the

¹ Rev. Stats. § 1993; *Post*.

² Hart's Dig. 1061, 1063, 1107, 1153, 1154; *Post*.

³ *Horn v. Arnold*, 52 Tex. 165; *Post*.

⁴ Rev. Stats. § 1996; *post*.

⁵ *Sossaman v. Powell*, 21 Tex. 664; *Griffie v. Maxey*, 58 Tex. 213.

party is entitled, and that the property claimed is in fact the homestead.¹

3. "On the death of the wife, leaving a husband surviving, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of such surviving husband, or so long as he may elect to use or occupy the same as a homestead."² No matter whether the land is community property, or the separate property of either husband or wife, its appropriation as a homestead will not change or affect its title, except in so far as this is necessary, in order to secure and give effect to the privileges and immunities granted to the heads of families and surviving widows and children by the Constitution and statutes upon the subject.³

It will be seen from the above provisions that neither the husband nor wife acquires any title in the homestead other than that originally possessed by them or either of them. The homestead right is simply a right of occupancy, not of title, and is the same in either the surviving husband or wife. But occupancy is expressly required only as against the right of the descendants of the deceased husband or wife to have the homestead partitioned and their interests set apart to them.⁴ This prohibition against partition is applicable only to those who claim as *heirs* of the estate of the decedent, not to those who claim through other titles.⁵

¹ *McLane v. Paschal*, 47 Tex. 371.

² Rev. Stats. 2009.

³ *Battle v. John*, 49 Tex. 211.

⁴ *Schneider v. Bray*, 59 Tex. 670.

⁵ *Gilliam v. Null*, 58 Tex. 304.

Insolvent estates.—If the estate of the deceased husband, upon final settlement, proves to be *insolvent*, the title of the widow and children to the homestead is absolute.¹ This has been the rule since the Act of 1848.² The homestead, in such case, descends in fee to the widow and minor children for their joint benefit, and neither she nor the children are entitled to its exclusive possession to the prejudice of the other.³ If there are no minor children it vests absolutely in the widow.⁴ A sale of the homestead, when the estate of the husband is insolvent, vests no title in the purchaser as against these homestead rights of the surviving wife.⁵

Under the law of 1848 the homestead descended as above, freed from the liens of creditors, unless it be for the purchase money, and for work and labor or for materials furnished in constructing or erecting improvements upon the property.⁶

Upon this subject the Revised Statutes provide as follows: "No property upon which liens have been given by the husband and wife, acknowledged in a manner legally binding upon the wife to secure creditors, or upon which a creditor's lien exists, shall be set aside to the widow or children as exempted property, . . . until the debts secured by such liens are first discharged."⁷ "The homestead shall not be liable for the

¹ Rev. Stats. 2002.

² Pasch. Dig. 1305; *James v. Thompson*, 14 Tex. 468; *Sossaman v. Powell*, 21 Tex. 664.

³ *Horn v. Arnold*, 52 Tex. 161; *Putnam v. Young*, 57 Tex. 464.

⁴ *Rainey v. Chambers*, 56 Tex. 20.

⁵ *Black v. Rockmore*, 50 Tex. 88; *Armstrong v. Moore*, 59 Tex. 646.

⁶ *Robertson v. Paul*, 16 Tex. 472; *Green v. Crow*, 17 Tex. 188; *Blair v. Thorp*, 33 Tex. 49; *Reeves v. Petty*, 44 Tex. 252; *Mabry v. Ward*, 50 Tex. 412; *Horn v. Arnold*, 52 Tex. 164; *Post*.

⁷ Rev. Stats. § 2000.

payment of any of the debts of the estate, except for the purchase money thereof, the taxes due thereon, or for work and material used in constructing improvements thereon; and in this last case only when the work and material are contracted for in writing, with the consent of the wife, given in the manner as required in making a sale and conveyance of the homestead."¹ Under the laws of 1848, in case of *solvent estates*, the homestead was partitioned and distributed as the other property of the estate.² Under the Revised Statutes the rule is different. Section 2001 provides as follows: "If, upon a final settlement of such estate, it shall appear that the same is *solvent*, the exempted property, *except the homestead*, which has been set apart to the widow or children or both, shall be subject to partition and distribution among the heirs and distributees of such estate in like manner as the other property of the estate."³

The homestead forms no part of the estate of a deceased person when a constituent of the family survives.—"The Constitution protects the surviving husband or wife in their right to the homestead, whether as against the heirs of the deceased or the creditors of the survivor, so long as such survivor chooses to occupy the homestead as such. And this exemption does not depend upon the title being in the survivor. Whether the title to the property be vested in the community, or be the separate property of the deceased or of the survivor, is immaterial.

¹ Rev. Stats. § 2007.

² Pasch. Dig. 1305; *O'Docherty v. McGloin*, 25 Tex. 72; *Singletary v. Hill*, 43 Tex. 590; *James v. Thompson*, 14 Tex. 466; *Sossaman v. Powell*, 21 Tex. 665; *Putnam v. Young*, 57 Tex. 464; *Jergens v. Schiele*, 61 Tex. 259.

³ Rev. Stats. § 2001.

"It is not necessary that the surviving husband or wife should have any one living with him or her. He or she may or may not have any other members of the family or even any servants residing with him or her."¹

A mother died in 1873, the father having died some time before. The only surviving constituent of the family was a minor son, the other children having all arrived at maturity. It was held that the law in force at the time of the death of the mother vested the homestead in him as the surviving constituent of the family, and it was not necessary for the Probate Court to designate and set the same aside to him, for in such a case the law declares that the homestead does not constitute any part of the estate. He had this right until he arrived of age, without being compelled to render any account of the rents, revenues, and profits thereof.²

The homestead exemption ceases when the family ceases. It was accordingly held, where the husband and wife died almost contemporaneously, and no unmarried or minor children remained, no wards, no grandchildren, or apprentices, nor any member of the family of the decedents, that the family had ceased and with it the homestead. Orphaned grandchildren, living with their grandparents at the time of their decease, may be entitled to take a homestead right, but not unless their home was with the grandparents at such a time. Children and

¹ Rev. Stats. § 2004-9, *supra*; Paach. Dig. 5487, 6834; Ball v. Lowell, 56 Tex. 584; Eubank v. Landram, 59 Tex. 248; Carter v. Randolph, 47 Tex. 379; Taylor v. Boulware, 17 Tex. 77; Pryor v. Stone, 19 Tex. 374; Wood v. Wheeler, 7 Tex. 13; Kessler v. Draub, 52 Tex. 579; O'Docherty v. McGloin, 25 Tex. 72; Blum v. Gains, 57 Tex. 121; Sossaman v. Powell, 21 Tex. 665; Kessler v. Draub, 52 Tex. 575; Pressly v. Robinson, 57 Tex. 459; Watkins v. Davis, 61 Tex. 416.

² Ring v. Smith, Tex. Court of Appeals (Civil Cases), § 1115; Sossaman v. Powell, 21 Tex. 665.

heirs can not succeed to the homestead right of their parents, unless they had remained together as a family.¹

The homestead is as exempt from debts after the death of the husband as before.—The widow and children are entitled to the whole thereof and not simply to such portion as remains after paying the charges against the community or the estate of the husband.²

Misconduct of wife.—A wife who voluntarily, and without any just and reasonable cause, abandons and separates herself from her husband, and continues, in wanton disregard of her duties as a wife, to live separate and apart from him at the time of his death, is estopped and precluded from claiming the homestead rights given by the law to the surviving wife. The homestead is intended for the comfort and security of the *family*, and for like considerations its rights and privileges are extended to and conferred upon the *family* of the decedent after his death, so long as any constituent remains. When the wife has voluntarily and without cause withdrawn from and destroyed the *family*, ceased to be a member of it, it would be mockery to say that she is reunited to or again become a member of it by the death of the husband, or can claim privileges and immunities which by law are only given to the *family* or some surviving constituent of it. The same rule does not apply to her interest in the community property or her distributive portion of the separate estate of her deceased husband, as this grows out of and depends upon the existence of the marital relation between the parties, and not

¹ *Sossaman v. Powell*, 21 Tex. 664; *Hoffman v. Neuhaus*, 30 Tex. 633; *Burns v. Jones*, 37 Tex. 51; *Petty v. Barrett*, 37 Tex. 85; *Reeves v. Petty*, 44 Tex. 251.

² *Sossaman v. Powell*, 21 Tex. 663.

merely upon the continued existence of the family; and the mere withdrawal of the wife from the husband and continuing to live separate and apart from him, however unjustifiable and improper, does not operate as, and can not be treated as, tantamount to a severance of the marital relation. If a wife voluntarily abandons her husband and continues her abandonment several years previous to his decease, she forfeits her claim to a homestead. But an involuntary absence, or an absence not amounting to an abandonment of the husband, or even an absence not continued for years immediately previous to the husband's death, from which it would be inferred that the wife had no intention of returning to her husband, would not forfeit her right to a homestead. The fact that the wife was never in the State during her husband's lifetime does not of itself debar her homestead rights in land purchased by him for homestead purposes, if her absence was with his consent.¹

Marriage of surviving husband.—If the surviving husband marries again, his homestead rights are neither increased nor diminished, nor does his second wife acquire any homestead rights therein other than that during his lifetime she is protected in his homestead. His rights therein are personal and do not descend to her. He could not establish a new homestead on it to the prejudice of the rights of the heirs of his deceased wife to a partition, and, at his death (his surviving wife not being able to claim any greater rights than he had) these heirs are entitled to a partition of their interest in the land derived through their mother, and this,

¹ *Trawick v. Harris*, 8 Tex. 312; *Earle v. Earle*, 9 Tex. 630; *Lacey v. Clements*, 36 Tex. 661; *Sears v. Sears*, 45 Tex. 559; *Newland v. Holland*, 45 Tex. 589; *ante*.

irrespective of the question of homestead; and the second wife, surviving him, is entitled, subject to this partition and the equities, if any, growing out of it, to the enjoyment of his half interest in the old homestead, if any, existing at the death of the first wife, and which was still continued at his death. She is not liable for the use and occupation of such interest, nor is she liable for the use and occupation of the whole homestead, if she did not hold the interest of the heirs of the deceased wife adversely to their right of joint possession.¹

The above rule applies only when the homestead is community property. When it is separate property of the husband, the second wife and her children have the same interest therein as the first wife and her children have. The children of the first wife, in such a case, are (like the children of the second wife) heirs of the husband and not of their mother.²

Homestead exemption is for the head of the family, not for the children.—The constitutional exemption as to the homestead is to the *surviving head of the family*, and *not* to the *children*. The parent has the right to dispose of the homestead without consulting the children, and whatever will bind the parent will bind them. If the homestead is the separate property of the surviving parent he or she can dispose of it, the children having no interest therein, and the purchaser will take full title. They can, however, control the surviving parent in any effort to dispose of any estate which has descended to them. If the homestead was the community property of their parents, the children inherit the share of the deceased parent just as they inherit other

¹ Pressley v. Robinson, 57 Tex. 453; Putnam v. Young, 57 Tex. 464.

² Foreman v. Meroney, 3 Tex. Law Reporter, 233.

community property, though they have no interest in the homestead as such, as against the surviving parent, by virtue of the homestead rights of the deceased parent. In such a case one-half of it would descend to the children, on the death of the mother, but subject to the right of the surviving husband to use and occupy it as a homestead during his life. Should he abandon it, the children would be immediately entitled to a partition. A purchaser from the surviving husband of such a homestead will be a tenant in common with the children.¹

The Probate Court has jurisdiction to determine what is the homestead, but not to order the sale of the homestead to pay debts, where there is a family left who have the right to occupy it;² but its action in setting aside a homestead is conclusive, except when directly attacked.³

§ 76. Probate homestead.—*California*.—(a) *Before the Code*.—The Probate Act of 1851, as amended in 1861 and 1866, provided that “the Probate Court could, on the death of the husband, *there being no homestead already designated and recorded*, set apart for the use of the widow or minor children, a homestead consisting of any quantity of land *not exceeding twenty acres, and the dwelling house thereon with its appurtenances*, not being included in any incorporated town or city; or

¹ *Tadlock v. Eccles*, 20 Tex. 782; *Sossaman v. Powell*, 21 Tex. 664; *Brewer v. Wall*, 23 Tex. 589; *McCreery v. Fortson*, 35 Tex. 648; *Hartman v. Thomas*, 37 Tex. 92; *Magee v. Rice*, 37 Tex. 499; *Walker v. Young*, 37 Tex. 519; *Bell v. Schwarz*, 37 Tex. 572; *S. C.*, 56 Tex. 353; *Clark v. Nolan*, 38 Tex. 418; *Johnson v. Taylor*, 43 Tex. 122; *Wright v. Doherty*, 50 Tex. 40; *Grothaus v. De Lopez*, 57 Tex. 670; *Shannon v. Gray*, 59 Tex. 252.

² *Yarboro v. Brewster*, 38 Tex. 409.

³ *Canon v. Bonner*, 38 Tex. 487.

instead thereof, a quantity of land *not exceeding one lot* in any incorporated town or city, *and the dwelling house thereon and its appurtenances*, to be selected by the widow, or if there be no widow, to be designated by the probate judge, and not to exceed in any case more than *five thousand dollars*.”¹ In 1868 this was amended so as to provide for the setting apart of such a homestead for the “husband or wife, or the minor child or children of the deceased.”²

¹ Hittell's General Laws, 5819, 5822; Estate of Busse, 35 Cal. 310; Estate of Wixom, 35 Cal. 324.

Nevada.—Compiled Laws, 606; Estate of Walley, 11 Nev. 262. In the Estate of Walley, 11 Nev. 264, the court distinguished as follows between a homestead selected under the Homestead Act and one set apart under the Probate Act: “They (these two Acts) are entirely independent, and, in fact, contemplate different objects. Each is intended to exempt the homestead from certain liabilities, but the one, the *Homestead Act*, exempts it from liability for the debts of the owner, so long, at least, as he continues to be the head of the family, no matter at what time, after November 13, 1861, the debts may have been contracted, whether before or after the family relation commenced, or before or after the homestead was dedicated. The other, the *Probate Act*, has a more limited, but at the same time, an independent operation. It merely exempts the homestead in favor of the widow or minor children of a deceased person, from the payment of the *general debts contracted by him in his lifetime, and from debts accumulating in the course of administration*.”

“A homestead set apart under the Probate Act simply becomes not subject to administration, that is, not subject to the claims of general creditors of the estate, *but it remains subject, in the hands of the widow, to the payment of her debts whether contracted before or after it was so set apart*. To make it a homestead, within the meaning of the Homestead Act, so as to be exempt from the payment of her debts, as well as those of her deceased husband, she would have to claim it under the homestead law; and in order to do that she would have to show that she was the head of the family.” The court further pointed out the difference between these two kinds of homesteads by showing that the Probate Act “was designed to secure to a widow, whether *childless* or not, a homestead exempt from liability for the debts of her deceased husband,” whereas a widow who is *childless* can not acquire a homestead under the Homestead Act, because she is “*unmarried*” and not “the head of a family.”

² Stats. 1860, p. 172.

Section 125 of this Act provided that such should be the property of the widow, if there were no minor children, of the minor children if there were no widow, and of the widow and children, if both were surviving, one-half to the widow and one-half to the children.¹

Section 127 of this Act provided that if the widow had a maintenance derived from her own property equal to the homestead and other exempt property by this Act set apart to her, the whole property so set apart to her went to the minor children.²

(b) *Under the Code.*—Section 1465, Code of Civil Procedure, as first enacted, provided simply that, if no homestead had been selected, designated, and recorded during the life of the parties, the court upon the death of either husband or wife, must select, designate, set apart, and cause to be recorded out of the real estate of the decedent a homestead for the use of the surviving husband or wife or minor children.

In 1880 this section was amended so as to read as follows: "If none has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided in Article 2 of this chapter, out of the common property,

¹ Hittell's General Laws, 5823. *Nevada*—Compiled Laws, 607 (same as in California).

² Hittell's General Laws, 5825; *Nevada*—Compiled Laws, 609 (same as in California).

or if there be no common property, then out of the real estate belonging to the decedent."

The selection of the homestead, where none had been selected, designated, and recorded in the lifetime of the decedent, *must* be made out of the *common property* if there be any. It can be made from the *separate property* only in case there is no common property. The statute in this regard is clear and explicit, and admits of no question.¹

Furthermore, it can not be set apart out of property that could not have been dedicated as a homestead by the parties while living. Prior to the Act of 1868² it could not, therefore, have been set apart out of land which was a part of the assets of the partnership of which the deceased was a member.³ A homestead so set apart must not exceed in value five thousand dollars.⁴

The Probate Court has no discretion, but *must* set apart a homestead for the benefit of the family of the deceased.⁵ In *Estate of Ballentine*, the word "*may*" in section 121 of the Probate Act, "The court, or probate judge *may* . . . set apart" was construed to mean "*shall*." The language of the Code⁶ is similar.

The fact that an order had been made for the sale of certain land, property of the estate of the deceased, will not prevent the court from setting aside a homestead out of the same,⁷ nor will a testamentary dispo-

¹ *Estate of Lord*, 2 West Coast Reporter, 130; *Mawson v. Mawson*, 50 Cal. 542.

² *Ante*.

³ *Kingsley v. Kingsley*, 39 Cal. 666.

⁴ *Estate of Burns*, 54 Cal. 223.

⁵ *Estate of Ballentine*, 45 Cal. 696.

⁶ Code of Civil Procedure, § 1465.

⁷ *Estate of Smith*, 51 Cal. 565.

sition of the property prevent the court from setting it apart as a homestead for the family of the testator.¹

Money.—The Probate Court can not set apart money to the widow in lieu of a homestead.²

When property is so set apart as a homestead by the Probate Court, “if the decedent left a widow or surviving husband, and no *minor child, such property is the property of the widow or surviving husband.* If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children.”³

The section, as originally enacted, did not contain the words “*or surviving husband.*” In 1881 it was amended by adding this clause: “If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order.”⁴

Prior to this amendment there was an important difference, in this regard, between “homesteads selected and recorded *in the lifetime of the parties*” and “*homesteads set apart by the Probate Court out of the separate estate of the deceased.*” If the homestead was set apart by the Probate Court out of the separate estate of the deceased husband, it belonged to the widow and chil-

¹ *Sulzberger v. Sulzberger*, 50 Cal. 387; *Eproson v. Wheat*, 53 Cal. 715.

² *Estate of Isaacs*, 30 Cal. 105.

³ Code of Civil Procedure, § 1468; *Mawson v. Mawson*, 50 Cal. 539.

⁴ *Estate of Lord*, 2 West Coast Reporter, 131; Code of Civil Procedure, § 1465.

dren, if there were any; while, on the other hand, if the homestead was selected and recorded while the husband and wife were both living, out of the separate estate of either, it vested, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the Probate Court to assign it for a limited period to the family of the decedent.¹ By this amendment the two homesteads were governed by the same rule in this regard. But this rule in regard to a homestead selected in the lifetime of the husband and wife, as prescribed in section 1265, Civil Code, is somewhat changed by section 1474, Code of Civil Procedure, this latter section limiting the above rule to those instances where "the homestead was selected from the separate property of either the husband or wife, *without his or her consent.*" If selected *with this consent* it vests absolutely in the survivor.²

The important distinction between the two homesteads is this: The widow acquires no interest in a probate homestead until it has been set apart to her by the Probate Court. It becomes hers by the decree of the court or judge. The title to a homestead acquired otherwise vests in her upon the death of her husband; it becomes hers by operation of law.³

Assignment of Homesteads.—Section 1485, Code of Civil Procedure, provides that "persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter pro-

¹ *Mawson v. Mawson*, 50 Cal. 543; Code of Civil Procedure, §§ 1468, 1474.

² Code of Civil Procedure, § 1474.

³ *Estate of Boland*, 43 Cal. 642; *Higgins v. Higgins*, 46 Cal. 266.

vided, have all the rights and benefits conferred by law on the persons whose interest and rights they acquire."

In *Estate of Moore*, 57 Cal. 443, the court held that this section 1485 does not apply to a homestead not declared during the lifetime of both spouses. In this case the widow, after making a quit-claim deed of all her interest in the separate property of her deceased husband, petitioned the court to set apart to her a portion of this property as a homestead. The petition was opposed upon the ground that she had disposed of her right to have a homestead so set apart. The court said: "Setting apart a homestead is a part of the probate proceeding, as much as is a family allowance. . . . The right to a probate homestead, so called, is not the subject of sale. . . . Before the action of the Probate Court no estate has vested in the family, so far as homestead is concerned. . . . The right to have a homestead set apart is no estate, either in law or equity. . . . Referring to section 1485 of the Code of Civil Procedure, it may well be said that the language there used is quite clear if applied to a homestead declared in the lifetime of the spouses; but if an attempt be made to apply it to a probate homestead, the language is quite obscure, if not meaningless. Persons succeeding by purchase or otherwise to the interests, rights, and titles of successors to homesteads, or to the right to have homesteads set apart,' etc. etc. Does the language embrace the idea, 'successors to the right to have homesteads set apart?' If so, there is no meaning in it; there is no such thing as an heirship to have a probate homestead, though there may be heirship after the property has been set aside. Does the language embrace the idea, 'succeeding by purchase or otherwise to

the interests of successors to homesteads?' If so, the words are equally meaningless; because, as stated in the opinion of the department, nothing which is the subject of sale vests prior to the setting apart. It is true there is a right to apply, and there is equal power in the court to designate this or the other piece of land; no interest in any parcel of land vests until the action of the court. In the case of a declared homestead, an instance can be put where those words would apply, viz.: A dies, leaving a widow, a homestead having been declared in his lifetime; the widow thereupon has a title to the homestead, and the right to have it ad-measured and set apart to her; before doing so, she conveys the homestead property, or dies leaving heirs; in such case, her grantees or heirs (as the case may be) succeeding 'by purchase or otherwise' to her homestead right, *i. e.*, the property which came to her as survivor, may apply to have the homestead, or rather that which *was* the homestead, but is no longer a homestead (having passed out of and beyond the scope of a homestead, and become property discharged of its former character), set apart to them out of, removed from the administration of the estate of A, deceased. But an attempt to apply those words to a probate homestead would not readily find a solution. If a widow die before applying for a probate homestead, any right to apply which she might have had is gone; no person succeeds to that right; no adult child of hers can have a right; no minor child can have any right increased by her death; therefore there can be no such thing, under this statute, as successor to the right to have a probate homestead set apart."

The effect of a second marriage upon the right of the

widow to probate homestead.—(a) *Before the Code.*—The Probate Act of 1851 made provision for but two classes, viz., the *widow* and the *minor children* of the deceased, in other words, the *family* of the deceased. It was accordingly held where there was no longer a *family*, the widow having married again and the minor child (a girl) being of age and married, there was no longer any *status* upon which the right rested.¹

If, however, she still had the control of minor children by her first marriage, she did not lose her right to a probate homestead by her second marriage, there being still a “*family of the deceased.*” “The homestead, when set apart, is to be set apart for the benefit of the widow *and* children. Every minor child has an interest and has a right to be named in the decree; the property set apart is to be a home for *them all*—she, the widow, taking her place as the head of the family.”²

(b) *Under the Code.*—The Code³ in no way changes the law in this regard. It is true the court in *Estate of Moore*⁴ use the following language: “This court has already held that the status of the widow at the time of the application, must be considered, and if she by subsequent marriage has ceased to be the widow of the deceased, she can not have a probate homestead set apart to her. If she should . . . die or marry again, there would be no right of homestead to survive her or her widowhood;” but the court evidently referred to *Estate of Boland*⁵ and not to *Higgins v. Higgins*.⁶ The distinction between the cases is very clear.

¹ *Estate of Boland*, 43 Cal. 642.

² *Higgins v. Higgins*, 46 Cal. 265; *Estate of Moore*, 57 Cal. 443.

³ Code of Civil Procedure, §§ 1464–70.

⁴ *Estate of Moore*, 57 Cal. 443.

⁵ *Estate of Boland*, 43 Cal. 642.

⁶ *Higgins v. Higgins*, 46 Cal. 265.

Two homesteads, a probate and a regular homestead, in the same person.—A married woman can claim a homestead in the estate of her second husband, although the Probate Court has set apart for her and her children a homestead out of the estate of her former husband. The two homesteads, as we have seen, are distinct. The children of her first marriage have no interest in the second homestead, and the children of her second marriage have no interest in the probate homestead set apart out of the estate of her first husband.

Texas.—In *Green v. Crow* the court said: "Under the Spanish Code, in force until 1840, a widow, without property of her own, was entitled (in preference to creditors) to one-fourth of the estate of her husband; this fourth not to exceed a specific amount. This provision fell with the repeal of the Spanish law, and there was no substitution for it, until by the Act to amend the probate law in 1848 (Hart. Dig. Art. 1061) such of the effects of the deceased as were by law exempt from execution, were directed to be set apart for the use of the widow and children of the deceased. This law was illusory in its promises of benefit, and unequal in its operation. In some estates there might be a homestead, with all the other articles exempted from forced sale. The widow, in such cases, would derive a substantial benefit. In other estates there might not be any of the exempted articles, *and nothing then would be set apart for the wife.* But the provision was enlarged, equalized, and rendered certain in its operation by the law of 1846 (Hart. Dig. Art. 1107), which declared that not only such property as is exempted from forced sale should be set apart for the widow and children, *but if there should not be, among the effects of the*

deceased, such specified articles, there should be sold a sufficiency of the estate to procure such exempted articles for the benefit of the widow and children. These laws vest a right in the widow to a specific portion of the estate, viz.: the homestead and the exempted articles, but the grant is restricted to this species of property. For, although, if these articles be not found in the estate, a sale may be ordered for the benefit of the widow and children; yet it is only to procure by purchase a homestead and other exempted articles, and not otherwise for the use or advantage of the widow or children.

. By the 45th section of the Act of 1848 (Hart. Dig. Art. 1154) all the property exempt from execution, except one year's supply of provisions, is to be set apart for the use and benefit of the widow and children. So far the section is in conformity with the previous laws of 1843 and 1846; but the section continues, that in case there should not be among the effects of the deceased, all or any of the specific articles so exempted, it shall be the duty of the Chief Justice, not, as by the law of 1846, to cause them to be procured, *but to make an allowance in lieu thereof* to the widow and children; which allowance may be paid either in money or in property of the deceased, that the widow and children may choose to take at the appraisement; or a part in both, as they may select. If there be no property of the estate that the widow and children are willing to take for the allowance, or not a sufficiency, and there be no funds or not sufficient in the hands of the executor or administrator to pay such allowance, then so much of the estate may be sold as will be sufficient to raise the allowance, or a part thereof, as the case may be; provided, that

if such estate be not *insolvent*, nothing in this section shall be so construed as to prohibit the distribution and partition of said estate among the heirs and distributees thereof, including the portion herein provided to be set aside for the use of the widow and children; and provided that a year's provision shall be exempt from such distribution. . . . *Unlike* the previous laws to which we have referred, the homestead or (under this section) the substituted allowance, is not to be designated out of every estate, for the widow and children, but only in cases where the estate is insolvent, or, if set apart from a solvent estate, no permanent interest or estate can inure to the beneficiaries, as the whole estate, including the portion for the widow and children, is distributable among the heirs and distributees."¹

The Act of 1848 provided that the exempt property should be set apart for the use of the "widow and children."² Nothing was said of "*minor* children." The word "children" was, however, construed to mean "*minor* children" only.³

The allowance in lieu of the homestead was required to be paid in the following manner: "If there was a widow, and no children, the whole was to be paid to the widow; if there was a child or children, and no widow, the whole was to be paid to such child or be equally divided among such children; if there were a widow and a child, or children, one-half was to be paid to the widow, and the other half to such child, or to be divided equally among such children."⁴ There is no allusion here to

¹ Green v. Crow, 17 Tex. 184.

² Pasch. Dig. 1305.

³ Horn v. Arnold, 52 Tex. 165; Hoffman v. Neuhaus, 30 Tex. 633.

⁴ Pasch. Dig. 1305.

“*minor children*,” but simply to “*children*.” By parity of reasoning, however, the same construction would apply as above mentioned.

The Revised Statutes provide that, when no homestead has been selected, it shall be the duty of the court, upon the death of the husband, to set apart a reasonable allowance in lieu thereof.¹ This allowance shall be paid “either in money out of the funds of the estate that may come to the hands of the executor or administrator, or in any property of deceased that such widow or children, if they be of lawful age, or their guardian if they be minors, may choose to take at the appraisement, or a part thereof, or both, as they may select,” and it shall be paid to the widow, if there are no children, to the children or their guardian (if they are minors) if there is no widow, and, if there are both widow and children, to the widow alone, unless the children are not hers, when it goes half and half to her and the children. If there is no property that the widow and children are willing to take, or not enough, or if there are no funds or not enough to pay such allowance, the court must order a sale of enough property to raise the necessary allowance.²

This allowance in lieu of a homestead must be made out of the *entire* estate of the deceased husband.³ It may be set apart out of an undivided interest belonging to the husband at the time of his death, but not to interfere with the rights of his co-tenants (as for instance, the heirs of a former wife, the land having been com-

¹ *Clift v. Kaufman*, 60 Tex. 64 (compare *Pressley v. Robinson*, 57 Tex. 460; *Ball v. Lowell*, 56 Tex. 579; *Carter v. Randolph*, 47 Tex. 380; *Mabry v. Ward*, 50 Tex. 404).

² Rev. Stats. 1993, 1999.

³ *Mabry v. Harrison*, 44 Tex. 295.

munity property of a former marriage).¹ If the homestead selected by her is not of the value of \$2,000, it should be made up in money arising from the sale of other property, should there be any, but it must not exceed five thousand dollars.² In *Ragland v. Rogers*,³ it was held that if the homestead selected by the surviving wife was not of the statutory value, it should be made up in money arising from the sale of other property of the estate, should there be any. This is in accordance with the following rule laid down in the Revised Statutes,⁴ viz.: "If there be no property of the deceased that such widow or children are willing to take for such allowance, or not a sufficiency, and there be no funds, or not sufficient funds of the estate in the hands of such executor or administrator to pay such allowance, or *any part thereof*, it shall be the duty of the county judge, on the application in writing of such widow and children, to order a sale of so much of the estate for cash as will be sufficient to raise the amount of such allowance or *a part thereof*, as the case may require."

The fact that the widow and children have separate property adequate to their support does not defeat their right to a homestead, or to an allowance in lieu thereof,⁵ but no such allowance can be given if the family already has an existing homestead, which was the family homestead during the lifetime of the husband and at his death. The exemption is for that homestead,

¹ *Gilliam v. Null*, 58 Tex. 304.

² Rev. Stats. § 1995.

³ *Ragland v. Rogers*, 34 Tex. 622 (but see *Ross v. Smith*, 44 Tex. 398; *Mabry v. Ward*, 50 Tex. 404).

⁴ Rev. Stats. § 1999.

⁵ *Mabry v. Ward*, 50 Tex. 411.

and not for another, to be selected out of the estate and set apart to the widow in lieu of it.¹

Where there is no homestead in fact, property upon which liens have been given may be sold to raise a reasonable allowance in lieu thereof, unless the lien has been given by the husband and wife, acknowledged in a manner legally binding to secure creditors, or unless the lien be for the purchase money.²

It has been held that the Probate Court can set aside a homestead of two hundred acres out of a larger tract, even though all of the purchase money has not been paid. The vendor's lien can not then be enforced until this order has been set aside in a direct proceeding with all the parties before the court. When the order has been so set aside, the surplus should be sold first, and then so much or all of the homestead as may be necessary to pay the purchase money.³

If a husband, with the legal consent of his wife, conveys the homestead to his minor children, the widow can not, after his death, have, as against creditors, other property of the estate set apart to her as a homestead.⁴ The question as to whether the claimant is the widow, and whether the children are legitimate, is material.⁵

It is the duty of the court to set apart the allowance in lieu of the homestead, even without any application on the part of those interested, and the failure of the

¹ *Hendrix v. Hendrix*, 46 Tex. 8; *Rogers v. Ragland*, 42 Tex. 444 (overruling same case, 34 Tex. 622); *McAlister v. Farley*, 39 Tex. 559; *Ball v. Lowell*, 56 Tex. 584.

² *Potshuiskey v. Krempan*, 26 Tex. 309; *Batts v. Scott*, 37 Tex. 65; *Reeves v. Petty*, 44 Tex. 250; *McLane v. Paschal*, 47 Tex. 366; *Griffith v. Maxey*, 58 Tex. 214; *Rev. Stats.* 2000; *ante*.

³ *Harrison v. Oberthier*, 40 Tex. 389.

⁴ *Woodal v. Rudd*, 41 Tex. 378.

⁵ *Robinson v. Crump*, 35 Tex. 426; *McLane v. Paschal*, 47 Tex. 366.

court to do this does not defeat their rights under the law.¹

Title of the widow and children to this allowance in lieu of a homestead.—The Revised Statutes provide the following rules :

(1) *Solvent estates.*—“If upon a final settlement of such estate it shall appear that the same is *solvent*, the exempted property, except the homestead, which has been set apart to the widow or children, or both, *together with* any allowance that has been received by them in lieu thereof, shall be subject to partition and distribution among the heirs and distributees of such estate in like manner as the other property of the estate.”

(2) *Insolvent estates.*—“Should the estate, upon final settlement, prove to be *insolvent*, the title of the widow and children to all the property and allowances set apart or paid to them, under the provisions of this and the preceding chapter, *shall be absolute*, and shall not be taken for any of the debts of the estate except as hereinafter provided.” “In ascertaining whether an estate is solvent or insolvent, the exempt property set apart to the widow or children, or the allowance in lieu thereof, and the allowance provided for in the preceding chapter, shall not be estimated or considered as assets of the estate.”²

There seems to be a distinction, in regard to the rights of *adult* children, between the *homestead* and the *allowance* in lieu thereof. The statute provides that the court shall set apart “for the use of the *widow and minor children and unmarried daughters remaining with*

¹ *Covenell v. Chandler*, 11 Tex. 249; *Runnells v. Runnells*, 25 Tex. 520; *Mabry v. Ward*, 50 Tex. 404; Rev. Stats., §§ 1993, 1994.

² Rev. Stats. 2001, 2002, 2003, 1984–1995.

*the family of the deceased, all such property of the estate as may be exempt from execution or forced sale by the Constitution and laws of the State, with the exception of any exemption of one year's supply of provisions,"*¹ and that "in *all* cases the homestead shall be delivered to the widow, if there be one, and if there be no widow, to the *guardian* of the *minor* children and unmarried daughters, if any, living with the family."² This excludes *adult* children from any interest in the homestead so as aforesaid set apart. The statute provides, however, that if there is no homestead the court must make a reasonable *allowance* in lieu thereof, and that this allowance must be paid, if there is no widow, to the children if they are of *lawful* age, else to their guardian.³

The provisions of the statute are inconsistent in distinguishing between the homestead and other exempt property, in one section excluding *adult* children from *all* the exempt property,⁴ and in another excluding them only from the *homestead*, section 1996 of the Revised Statutes providing as follows: "The exempted property set apart to the widow and children shall be delivered by the executor or administrator without delay, as follows:

"1. If there be a widow and no children, or if the children be the children of the widow, the whole of such property shall be delivered to the widow.

"2. If there be children and no widow, such property shall be delivered to such children, if they be of lawful

¹ Rev. Stats. 1993.

² Rev. Stats. 1996.

³ Rev. Stats. 1994, 1997.

⁴ Rev. Stats. 1993, 1996.

age, or to their guardian if they be minors, or the same may be equally divided among them, *except the homestead*.

“3. If there be children of the deceased of whom the widow is not the mother, the share of such children in such exempt property shall be delivered to such children if they be of lawful age, or to their guardian if they be minors, or may be equally divided between them.

“4. In *all* cases the *homestead* shall be delivered to the widow, if there be one, and if there be no widow, to the guardian of the minor children and unmarried daughters, if any, living with the family.”

The provision in regard to the persons to whom the *allowance* in lieu of the exempt property is to be paid is identical with the foregoing, omitting, of course, any reference to the homestead.¹

This statute thus presents this anomaly: Exempt property, except the homestead, or any allowance in lieu thereof, inures to the benefit of *adult* as well as *minor* children, while a homestead inures to the benefit *only* of *minor* children, and yet an *allowance* in lieu thereof inures to the benefit of *both adult and minor* children.

Abandonment of the allowance in lieu of a homestead.—A widow can abandon and relinquish to the use of the estate of her deceased husband her right to demand or receive the benefit of the allowance made to her. She can relinquish it “by a contract entered into by her for that purpose,” or she may, “*sua sponte*,” do so upon any reason or consideration satisfactory to herself. Where a widow received a portion of her allowance, and did not assert her claim to the balance until

¹ Rev. Stats. 1998.

after many years, she having in the meantime wrongfully appropriated to her own use property of the estate exceeding in value this unpaid balance, it was held that the circumstances of the case warranted the court in holding that she had abandoned her right to this unpaid allowance.¹

§ 77. Parties to actions concerning the homestead.—*California*.—Under the theory that the homestead was a joint estate in the husband and wife they were required to sue and be sued jointly. She could not sue alone, as it was not her separate property, and he could not sue alone, as it was neither his separate property nor was it community property. Legal proceedings, to be conclusive against either, had to be against both.²

Under the Code the homestead is not considered as held in joint tenancy, but it vests in fee in the surviving wife if it was carved out of the community property, or out of her husband's separate estate with his consent, or out of her own separate estate with her consent. Under such circumstances it would, of course, be necessary to make the wife a party in any action concerning the homestead. If it was carved out of the husband's separate estate without his consent, it vests, on his death, in his heirs.³ In such a case there appears no necessity for making the wife a party, so far as the title to the property is concerned. As the home-

¹ Tiebout v. Millican, 61 Tex. 514.

² Sargent v. Wilson, 5 Cal. 504; Poole v. Gerrard, 6 Cal. 71; Revalk v. Kraemer, 8 Cal. 67; Kraemer v. Revalk, 8 Cal. 74; Van Reynegan v. Revalk, 8 Cal. 75; Cook v. Klink, 8 Cal. 352; Marks v. Marsh, 9 Cal. 96; Moss v. Warner, 10 Cal. 296; Guiod v. Guiod, 14 Cal. 506; Mabury v. Ruiz, 58 Cal. 11.

³ Code of Civil Procedure, §§ 1474, 1475.

stead can not be carved out of the wife's separate estate without her consent,¹ this contingency can not arise.

Texas.—A necessary party.—The wife is a necessary party defendant if there is any defense that can be urged, growing out of her homestead rights, which would defeat the action.² In an early case, where it was sought to foreclose a mortgage upon the homestead property, the court in denying the right of the minor children to intervene (the wife being dead), said: "If the *wife* were here to assert *her* rights, *she* would *not* be concluded, because not a party to the proceedings, and because she can not be divested of her right, except by her own voluntary act."³

The wife can not maintain in her own name, without joining her husband, an action for the recovery of the homestead, the same being community property,⁴ unless the husband is absent or refuses to join her in the suit.⁵

In *Murphy v. Coffey*, where the wife attempted to bring suit alone for the recovery of the homestead, alleging that it had been conveyed by her husband without her consent, the court held that the suit would not lie, but based its decision solely upon the reason that the wife can not institute a suit in her own name, her husband not being a party, to recover *community* property (the homestead in that case being community property). In *Kelley v. Whitmore*, it was held that the wife could maintain a suit to recover her homestead without joining her husband, when her husband is

¹ Civil Code, § 1238.

² *Jergens v. Schiele*, 61 Tex. 258.

³ *Tadlock v. Eccles*, 20 Tex. 782.

⁴ *Murphy v. Coffey*, 33 Tex. 510.

⁵ *Kelley v. Whitmore*, 41 Tex. 647.

absent or refuses to join in the suit, the court treating such cases as exceptions to the rule, and limiting the rule laid down in *Murphy v. Coffey* (*supra*), to this extent.

There have been no other decisions upon this point, and these two were decided independently of any question of homestead, but entirely with reference to *community property*.

It has been held that the *surviving* wife can maintain an action for damage to the homestead, she occupying it as such homestead by right of her survivorship, but the facts of the case in which this ruling occurs show that the widow was the owner in fee of an undivided half of the homestead property by virtue of her community rights, the same being community property.¹ In such a case the question can arise only as to the joinder of the children, and it is well settled that the widow alone must sue.² This rule applies to the allowance in lieu of the homestead, it being held that the widow alone, and not the children, is entitled to sue the administrator for such allowance.³

§ 78. Homestead of an insolvent.—*California*.—Under the Insolvent Acts of 1852 and 1880 it was and is the duty of the court to exempt and set apart for the use and benefit of the insolvent a homestead. Section 60 of the Act of 1880 provides that it shall be set apart as prescribed in section 1465, Code of Civil Procedure.⁴ But there must be a valid homestead in existence when the insolvency court makes an order setting one apart, or

¹ *Railroad v. Knapp*, 51 Tex. 599.

² *Ante*.

³ *Burt v. Box*, 36 Tex. 115.

⁴ Stats. 1850-3, p. 314; Insolvent Act of 1880, § 60.

its order will be null and void.¹ The neglect or refusal of the judge of the insolvency court to set such premises aside to the debtor is not a conclusive adjudication that such premises are not a homestead, nor is it equivalent to an abandonment.² An insolvent may maintain ejectment to recover his homestead, pending proceedings in insolvency.³

Homestead of a bankrupt.—Texas.—The homestead was saved to the bankrupt under the provisions of section 14 of the Bankrupt Act of March 2, 1867. There is no State provision.⁴

§ 79. Effect of divorce upon the homestead.—*California.*

(a) *Before the Code.*—A homestead established upon the common property of the husband and wife could, in case of a divorce, be partitioned or set apart to one of the parties as common property.⁵

(b) *Since the Code*—Section 147, Civil Code, provides that (1) "if a homestead has been selected from the community property, it may be assigned to the innocent party either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided; (2) if a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party." This section pro-

¹ *Matzen v. Schaeffer*, 2 West Coast Reporter, 127.

² *Dascey v. Harris*, 3 West Coast Reporter, 203.

³ *Moore v. Morrow*, 28 Cal. 551.

⁴ *Maxwell v. McCune*, 37 Tex. 515.

⁵ *Ante*; *Gimmy v. Gimmy*, 22 Cal. 633; *Gimmy v. Doan*, 22 Cal. 635.

vides also that the court, in rendering a decree of divorce, must make such order for the disposition of the homestead as above provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds.

Section 148, Civil Code, provides that the disposition of the homestead as above provided is subject to revision on appeal in all particulars.

A decree of divorce partitioning the homestead, amounts to a declaration of abandonment, and leaves the property liable to a sale on execution for the debts of the respective owners.¹

¹ Shoemaker v. Chalfant, 47 Cal. 432.

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